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COURT OF CRIMINAL APPEALS
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IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

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COURT OF CRIMINAL APPEALS
3/30/2020
DEANA WILLIAMSON, CLERK

KRISTOPHER LOVE,
APPELLANT

v.

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS,
APPELLEE

On appeal from the 363rd Judicial District Court of Dallas County, Texas
Trial Cause No. F15-76400-W

STATE'S BRIEF

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The State requests oral argument only if Appellant argues.

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STATEMENT REGARDING ORAL ARGUMENT

The State requests the opportunity to present oral argument if the Court grants Appellant's request to argue.

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State of Texas submits this brief in response to the brief of Appellant, Kristopher Love.

STATEMENT OF THE CASE

This is an automatic appeal from a sentence of death. Tex. Code Crim. Proc. Ann. art. 37.071, § 2(h). A Dallas County jury found Appellant guilty of capital murder for shooting and killing Kendra Hatcher in the course of robbery.[1] (Supp CR: 12, 323, 338, 349; 40 RR 47); Tex. Penal Code Ann. § 19.03(a)(2). In accordance with the jury's answers to the special issues, the trial court sentenced Appellant to death on October 31, 2018. (Supp CR: 12, 347-48, 349; 43 RR 94); Tex. Code Crim. Proc. Ann. art. 37.071, § 2(g). Appellant presents 46 allegations of reversible error.

STATEMENT OF FACTS

GUILT-INNOCENCE EVIDENCE

A. The murder of Dr. Kendra Hatcher

Dr. Kendra Hatcher, a native of Springfield, Illinois, began practicing pediatric dentistry in Dallas in 2011. (37 RR 23-26). Dr. Hatcher was fluent in Spanish and enjoyed helping the Spanish-speaking children who visited her dental office, The Smile Zone, in Irving. (37 RR 26-27). In the summer of 2015, Dr. Hatcher told her

[1] The original indictment also alleged murder for remuneration or the promise of remuneration, but this alternative theory of capital murder was abandoned by the State before jury selection began. (Supp CR: 17, 323; 3 RR 17-18; 37 RR 9-10).

family about Ricky, the man she had been dating for a few months, and made plans to bring him to her hometown in the Fall so that he could meet her family. (37 RR 27-28). However, Dr. Hatcher's life tragically ended on September 2, 2015, when she was robbed and murdered in the gated parking garage of her Dallas apartment complex. (37 RR 29-30).

Hashem Saad lived in the same complex as Dr. Hatcher, the Gables Park 17 Apartments located in Uptown Dallas. (37 RR 31, 40). On the evening of September 2, 2015, Saad left his apartment to get a haircut. (37 RR 33). When he came out of the elevator doors into the lowest level of the parking garage, he heard screaming and one or two gunshots. (37 RR 33, 35). He then heard a car door close and the screeching of tires. (37 RR 42). Saad ran straight to his car, a silver Corvette, and got inside. (37 RR 36). He saw a Jeep Cherokee drive fast down the ramp from the level above, make a left, and pass behind his car. (37 RR 36-37). Saad backed out of his parking spot and drove up the ramp toward the exit of the garage. (37 RR 37, 46). The Jeep turned around on the lower level where Saad had been parked, came up the ramp, and followed him out of the garage. (37 RR 37, 46). As Saad was driving up the ramp toward the exit, he saw a female who appeared to have been shot lying on the ground of the parking garage. (37 RR 44, 47-48). Saad called 911 as soon as he exited the garage and reported what he had heard and seen. (37 RR 37, 39-40; State's Exhibit "SE" 3).

Security footage from the parking garage showed that, at 7:13 p.m., the Jeep Cherokee pulled into the unsecured visitor area of the garage and waited. (39 RR 78; SE 20, 22-23, 27-29). At 7:17 p.m., the Jeep Cherokee followed another vehicle through the gate into the secured area of the garage and parked. (38 RR 69-71; 39 RR 78-79; SE 20, 22-23, 30, 70). At approximately 7:42 p.m., Dr. Hatcher pulled into the secured area of the garage driving a white vehicle and parked on the last row, which sloped downward and led to the lower level of the garage. (37 RR 51-52, 77; 39 RR 80-81; SE 21, 30). Immediately thereafter, an individual exited the parked Jeep Cherokee and walked down the ramp toward where Dr. Hatcher had parked. (37 RR 52; 39 RR 81; SE 23). Seconds later, the Jeep Cherokee's lights came on and it began to back out of its parking spot. (37 RR 52; 39 RR 82; SE 23). The individual who had exited the Jeep Cherokee walked back up and got into the vehicle, and then the Jeep Cherokee drove down the ramp to the lower level. (37 RR 52; 39 RR 76, 82-83; SE 23). At 7:44 p.m., a silver Corvette exited the parking garage, followed by the Jeep Cherokee. (37 RR 52; 39 RR 76, 79, 83-84; SE 21).

In response to Saad's 911 call, several officers and paramedics were dispatched to the location. (37 RR 53-54, 61-64; SE 33). Upon arrival, the first responders observed Dr. Hatcher lying on the ground on the driver's side of a white Toyota Camry. (37 RR 54-55, 69, 73-74, 77, 87, 97; SE 41, 54-55). The driver's side door was open and she was lying underneath the door. (37 RR 55, 57). They observed blood at

the scene and trauma to her chin. (37 RR 55, 78-79; SE 56-57). Dr. Hatcher was not breathing and had no pulse, so the paramedics slid her body about a foot forward so that they could begin resuscitation efforts. (37 RR 55, 57-58; SE 56). The paramedics realized very quickly, however, that the chest compressions were making the blood recirculate and come out of a wound in the back of her head, along with brain matter. (37 RR 55-56). These were signs incompatible with life, so they ceased CPR. (37 RR 56).

Abe Santiago with the Dallas Police Department ("DPD") Crime Scene Unit photographed, documented, and collected the evidence at the scene of the murder. (37 RR 64-67, 70; SE 34-70). There was a pistol magazine and fired bullet fragment outside the white Toyota Camry, to the left of Dr. Hatcher's body, and a fired cartridge case inside the vehicle on the floorboard of the passenger side. (37 RR 76, 79-80, 83-86; SE 51-52, 58, 60-61, 71-73). Dr. Hatcher's cell phone was lying on the ground close to the left side of her head. (37 RR 79-81, 86; SE 62, 74).

Medical Examiner Dr. Varsha Podduturi performed the autopsy of Dr. Hatcher. (40 RR 6-7, 9-10; SE 232, 234-45). Dr. Hatcher had a gunshot wound on the back of the head and an exit wound on the bottom of the chin. (39 RR 11, 13-14; SE 233-35). This indicated that the pathway of the bullet was from back to front and downward. (40 RR 14). Dr. Hatcher also had an abrasion on her chest in line with the exit wound, suggesting that her chin was down near her chest when she was shot. (40

RR 14-15; SE 238-39). The bullet transected Dr. Hatcher's spinal cord, which would have caused her to not be able to breathe. (40 RR 15). Dr. Podduturi determined that Dr. Hatcher's cause of death was a gunshot wound to the head and neck, and the manner of death was a homicide. (40 RR 18; SE 232).

David Spence, the supervisor of the trace evidence section at the Southwestern Institute of Forensic Sciences ("SWIFS"), examined the gunshot residue kit collected from Dr. Hatcher and found that she had gunshot residue on the back of both of her hands. (39 RR 26-30). According to Spence, this finding was consistent with Dr. Hatcher having both of her hands up and behind her head at the time she was shot in the back of the head. (39 RR 31).

At the time of her murder, Dr. Hatcher was dating Ricardo "Ricky" Paniagua, a dermatologist. (37 RR 28, 105, 109-10, 115). Dr. Hatcher and Dr. Paniagua met in May 2015 through an online dating website. (37 RR 115-16). They were smitten with each other, and their relationship became exclusive and serious very quickly. (37 RR 117, 132). Dr. Hatcher saw Dr. Paniagua as the love of her life. (37 RR 109). From June to September 2015, Dr. Paniagua and Dr. Hatcher took several trips together and even started a wedding fund. (37 RR 117, 132-33). They had plans to move to California together after Dr. Paniagua's employment with the University of Texas Southwestern Medical Center ended in October 2015. (37 RR 134).

Dr. Hatcher was murdered the night before she and Dr. Paniagua were scheduled to go on a trip together to Cancun, Mexico. (37 RR 105, 118). The murder occurred on a Wednesday, the day of the week that Dr. Hatcher typically worked from 1:00 p.m. to 7:00 p.m. (37 RR 118-19). After work, Dr. Paniagua picked up some things from his apartment and then went over to Dr. Hatcher's apartment. (37 RR 119). He went for a run, showered, and waited for Dr. Hatcher to come home. (37 RR 119). Dr. Hatcher had previously loaned her underwater camera to her friend, Rosy, and she wanted to bring it on their trip to Mexico. (37 RR 105, 119). A little before 7:00 p.m., she sent Dr. Paniagua a text message letting him know she was stopping by Rosy's apartment to pick up the camera. (37 RR 119). Around 7:35 p.m., Dr. Hatcher sent Dr. Paniagua a text message letting him know she was on her way home from Rosy's. (37 RR 119). After about twenty minutes had passed, Dr. Paniagua sent a text message to Dr. Hatcher and did not hear back from her. (37 RR 119). He noticed at this point that his text messages were not going through to Dr. Hatcher's phone, so he thought maybe she was talking on the phone to someone, as this had happened on a previous occasion. (37 RR 119, 121-22). Dr. Paniagua decided to go pick up something to eat and, as he was leaving Dr. Hatcher's apartment complex, he noticed a commotion and several police vehicles near the entrance of her parking garage. (37 RR 129). He sent Dr. Hatcher a text message letting her know that the

entrance to the parking garage was blocked so that she would know to park somewhere else when she got home. (37 RR 129).

When Dr. Paniagua returned to Dr. Hatcher's apartment complex just after 9:30 p.m., the apartment concierge stopped him. (37 RR 130). At that moment, he began to worry that something had happened to Dr. Hatcher. (37 RR 130). The concierge escorted him to an area behind the front desk where there were several members of law enforcement, and that is when he was informed that Dr. Hatcher had been shot and did not survive. (37 RR 130-31).

B. The motive: a scorned lover

Dr. Paniagua had previously dated a woman named Brenda Delgado, on and off, for about two and a half years. (37 RR 110-12, 114; SE 79). Their relationship ended in February 2015, but they remained friends and would occasionally text back and forth. (37 RR 112, 114, 117-18). In the months following their breakup, Dr. Paniagua would occasionally run into Delgado around town, such as when he was running on the Katy Trail or having dinner at a restaurant. (37 RR 114-15). At the time, Dr. Paniagua thought that these were just coincidences. (37 RR 115). Dr. Paniagua employed Delgado's mother as his house cleaner while they were dating, and he continued to have her clean his apartment even after he and Delgado broke up. (37 RR 112). Delgado's mother cleaned his house when he was at work or out of town, so he did not know if she came alone every time she cleaned his apartment. (37 RR 113).

During the time that Dr. Paniagua was dating Dr. Hatcher, Delgado was still presenting herself as a friend to Dr. Paniagua. (37 RR 131). Dr. Paniagua told Delgado that he was in a relationship and it was going well, but he never mentioned Kendra Hatcher or anything specific about Dr. Hatcher to Delgado. (37 RR 131). Dr. Paniagua had allowed Delgado to remain on his cell phone plan after their breakup. (37 RR 133). Delgado was supposed to contact the cell phone provider and have her line separated from his account, but she claimed they would not allow it because she did not have enough credit or money to pay off the remaining balance on her phone. (37 RR 133-34). In August 2015, due to the progression of his relationship with Dr. Hatcher, Dr. Paniagua paid off Delgado's cell phone and had her removed from his account. (37 RR 134-35).

Unbeknownst to Dr. Paniagua, Delgado was distraught about their breakup and was plotting to eliminate his new love interest. Delgado talked to her cousin, Moses Martinez, about her relationship with Dr. Paniagua. (37 RR 136-38). She was upset about the breakup and drinking a lot. (37 RR 138-39). She wanted to get back at Dr. Paniagua and talked to Moses about hurting him. (37 RR 138-39). At some point, the conversations turned to hurting a girl named Kendra. (37 RR 139). She told Moses she wanted him to hit Kendra with a baseball bat, and she offered him money and a car if he would do it. (37 RR 139-40). Moses told Delgado that this person she wanted to hurt was innocent and he would not do it. (37 RR 139). He told some of their

family members about what Delgado was asking him to do, but they did not believe him, and it caused a rift in the family. (37 RR 139).

Delgado met Milton Martinez and Roberto Menendez when she bought a Lexus from them in 2015, and they began to hang out socially as friends. (38 RR 10-12, 134-35). During this time, it became clear to Milton that Delgado was obsessed with her ex-boyfriend, Dr. Paniagua, and his current girlfriend, Dr. Hatcher. (38 RR 135-36). Delgado asked Milton if he knew someone who could hurt Paniagua and Hatcher. (38 RR 136). Milton told her he wanted nothing to do with that. (38 RR 136). He advised her to "leave it alone" and, whatever she was plotting, "drop it." (38 RR 136). Delgado did not bring it up to him again after that. (38 RR 136-37).

Delgado also talked to Menendez about Kendra Hatcher constantly. (38 RR 12-13). One night in June 2015, after dinner, Delgado told Menendez she wanted to visit a friend. (38 RR 13). He agreed, and she took him to an apartment complex in Uptown Dallas, which he later recognized from news coverage as Kendra Hatcher's apartment complex. (38 RR 13). Sometime in July or August of 2015, Menendez confronted Delgado about her obsession with Hatcher. (38 RR 14). Delgado got mad and did not talk to him for a week, and then after that she did not talk to him about Hatcher anymore. (38 RR 14).

In August 2015, Delgado's friend, Jennifer Calderon Escobar, was living with her. (37 RR 145). Escobar was partying, using drugs, and was "a mess" during this

time in her life. (37 RR 145). Escobar introduced Delgado to her friend, Crystal Cortes, who came over one day to hang out by the pool. (37 RR 151). Delgado was obsessed with her ex-boyfriend, Ricky, and talked to Escobar about him all the time. (37 RR 146). Delgado hatched several plans to hurt Dr. Paniagua, and later Dr. Hatcher, and she offered Escobar $2,000 and a car to help her execute her plans. (37 RR 149). Delgado talked to Escobar about beating them up with a baseball bat or injecting them with a needle. (37 RR 149-50). Initially, Escobar agreed to help Delgado, but after giving it further thought, she decided that she did not know these people and did not want to be involved. (37 RR 150). Escobar moved out of Delgado's apartment around August 20, 2015. (37 RR 152).

After Escobar moved out, Cortes and Delgado kept in touch and continued to hang out. (38 RR 33). Delgado talked to Cortes about Kendra Hatcher and wanting to "do away with her." (38 RR 33-34). In mid-August 2015, about two weeks after Cortes met Delgado, Cortes agreed to help Delgado, and they started planning Dr. Hatcher's murder together. (38 RR 37-38).

C. Planning and recruitment of Appellant

Cortes testified in detail about the events before, during, and after the murder of Dr. Hatcher.[2] According to Cortes, she and Delgado frequently observed and

[2] Cortes and the State entered into a plea agreement prior to Appellant's trial. (38 RR 31). Cortes pleaded guilty to the murder of Kendra Hatcher and agreed to provide truthful testimony in the

followed Dr. Hatcher at her home and work to figure out her daily routine. (38 RR 37). Delgado bought Nikon binoculars to assist in their surveillance of Dr. Hatcher. (38 RR 50-51; SE 135). Delgado was also using Dr. Paniagua's iPhone to track his whereabouts, which assisted them in determining Dr. Hatcher's whereabouts. (38 RR 50, 69).

At the end of August, Cortes and Delgado went to Cortes's mother's house. (38 RR 38-39). Kelly Ellis, his children, and his friend, Appellant, were at the house jumping on the trampoline. (38 RR 38-39). Cortes knew Ellis well because he used to be her neighbor and was friends with her brother, but this was the first time she or Delgado had met Appellant. (38 RR 39; SE 218, 224). Delgado told Cortes that they should recruit Ellis and Appellant to help them with Dr. Hatcher's murder, so they arranged a meeting with Ellis and Appellant later that day at the Mandalay Apartments in South Dallas. (38 RR 38-39, 41, 46). Delgado spoke only in Spanish and Cortes translated. (38 RR 66-67). Cortes explained their plan to murder Dr. Hatcher, and Ellis and Appellant agreed to participate. (38 RR 41).

From that point forward, Ellis and Appellant participated in the planning and surveillance of Dr. Hatcher. (38 RR 42, 61-62). On at least one occasion, they used Appellant's vehicle, a blue Chrysler Sebring, to conduct surveillance of Dr. Hatcher.

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trials of Appellant and Delgado in exchange for the State recommending a sentence of 35 years' imprisonment. (38 RR 31).

(38 RR 42, 89-90; SE 192). They also used a Mustang, a Lexus, and a BMW provided by Delgado. (38 RR 37). Delgado discussed purchasing a red Mitsubishi Galant to drive during the commission of the offense so that they could destroy it afterwards, but she did not end up completing the purchase. (38 RR 45-46; SE 113).

The participants met 10-15 times at the Mandalay Apartments to discuss and plan how they would murder Dr. Hatcher.[3] (38 RR 42, 46-47, 59-60, 66). During these meetings, Delgado continued to speak only in Spanish to Cortes, who would then translate to Appellant and Ellis. (38 RR 66, 130, 133). They discussed several possible plans, including kidnapping Dr. Hatcher, injecting her with a needle, and shooting her with a gun. (38 RR 60). Appellant told the participants that it would be easiest to kill her with a gun. (38 RR 61).

Ultimately, the participants agreed that they would kill Dr. Hatcher with a gun and make the offense look like a "robbery gone bad." (38 RR 67, 95). Because Cortes knew her way around Dallas better, Appellant suggested that Cortes be the driver, and he volunteered to be the shooter. (38 RR 95-96). Appellant was supposed to take Dr. Hatcher's belongings and kill her at the same time. (38 RR 67-68). Appellant obtained the .40 Smith & Wesson that was used in the offense. (38 RR 63-64; SE 170). Cortes

[3] Ellis's friend, Angelica Gordon, was also present during some of these planning meetings. (38 RR 94, 129-30, 132). Gordon testified that she saw Appellant, Cortes, and Delgado having discussions, but she was not a part of them and did not know the content of their conversations. (38 RR 94, 129-30, 132).

attempted to purchase a silencer for Appellant's gun but was unsuccessful. (38 RR 65). Appellant wore gloves when he loaded and handled the murder weapon, as suggested by Cortes. (38 RR 64).

Shortly before the offense, Delgado, Cortes, and Appellant decided to cut Ellis out of the plan. (38 RR 63). They observed that he was sloppy and talking too much, and they were afraid he would say something that would get them caught. (38 RR 63). Delgado promised to pay Cortes $500 for her participation as the driver, and she promised Appellant drugs and money to participate as the shooter. (38 RR 42-43, 67). Delgado presented herself as someone with a lot of money and connections to the drug cartel in Mexico, so they believed she would deliver on her promises. (38 RR 43).

D. Execution of the offense

On September 1, 2015, the day before the offense, Delgado, Cortes, and Appellant did a practice run. (38 RR 62, 66). They followed Dr. Hatcher from her apartment to her dental office and back to her apartment. (38 RR 62, 66). The morning of September 2, 2015, Delgado and Cortes dropped off Cortes's son at school and picked up Appellant at the Mandalay Apartments. (38 RR 43). They stopped at a convenience store for Appellant to buy a black shirt and then drove to the Jack-in-the-Box at I-35 and Royal Lane, where they dropped off Appellant to wait while they exchanged cars. (38 RR 43-45; SE 88). Delgado and Cortes went to a mechanic shop belonging to Jose Luis Ortiz, a childhood friend of Delgado's. (38 RR

17-18, 43-46, 69). The BMW they were driving was not running properly, and Ortiz had agreed to let Delgado borrow his black Jeep Cherokee for the day while he examined the BMW. (38 RR 19-20, 43-46, 69). After leaving Ortiz's shop, they picked up Appellant, returned to the Mandalay Apartments, and put paper tags on the Jeep. (38 RR 48).

Around 11:45 a.m., Cortes and Appellant went to Dr. Hatcher's apartment in the Jeep and parked across the street from the entrance to the parking garage so they could follow her when she left. (38 RR 48-50; SE 24-25). About 30 minutes later, Dr. Hatcher pulled out. (38 RR 51). They drove to her dental office in Irving, but when they realized she did not go straight there because it was not open yet, they returned to the Mandalay Apartments. (38 RR 52). That afternoon, Cortes left Appellant at his apartment and went to pick up her son from school. (38 RR 53). She took her son to Sonic and then dropped him off at her grandmother's house. (38 RR 52-53; SE 106).

Around 4:30 p.m., Cortes picked up Appellant from his apartment, and they drove to Dr. Hatcher's dental office in Irving. (38 RR 53). They parked across the street and waited for several hours, then drove back to Dr. Hatcher's apartment complex to wait for her there. (38 RR 53). Cortes was driving, and Appellant was lying down in the back seat so no one could see him. (38 RR 56, 71). Cortes pulled into the visitor's area of the garage and waited for a vehicle to enter so they could follow it in through the gate to the secured area of the garage. (38 RR 53-54). They knew this

routine well because they had been following Dr. Hatcher nightly and had done this about 12-15 times. (38 RR 54-55). The front three rows where Dr. Hatcher normally parked were already full, so they went to the last row, which had a slight down ramp, and parked next to a red car. (38 RR 54, 56, 70). They waited for about 30 minutes to an hour and then saw Dr. Hatcher pull into the garage in her white Toyota Camry. (38 RR 57, 69). Appellant put on his gloves, grabbed his pistol, and exited the vehicle. (38 RR 71). Cortes heard Dr. Hatcher scream and then shots fired. (38 RR 72-73). Cortes backed out of the parking spot, and Appellant got back into the Jeep. (38 RR 72-73). Appellant had in his possession Dr. Hatcher's purse, a Nikon camera, and the pistol. (38 RR 72). Cortes drove down the ramp thinking there was another exit below, but once she realized there was not an exit, she turned around and came back up to go out of the main entrance. (38 RR 72-73). As they drove back up the ramp toward the exit, Cortes saw Dr. Hatcher's body lying on the ground. (38 RR 73).

After they fled the scene, Cortes and Appellant went to an abandoned house in Pleasant Grove where they cleaned the Jeep with disinfectant and removed the paper tags. (38 RR 73-74). Cortes then dropped off Appellant at the Mandalay Apartments and drove to her grandmother's house to pick up her son. (38 RR 75). Appellant kept the murder weapon in his possession. (38 RR 75).

During the murder, Delgado was at dinner at the Chili's in Carrollton with Ortiz. (38 RR 21-22; 39 RR 46; SE 231). Ortiz met Delgado at the restaurant

expecting to retrieve his Jeep and was surprised to learn that it was not there because Cortes was driving it. (38 RR 21). When Ortiz asked when he would get the Jeep back, Delgado asked to borrow his cell phone to call Cortes and stepped outside to have her conversation with Cortes privately. (38 RR 23). Delgado asked Cortes if the task was complete. (38 RR 75-76). Cortes said "yes," and they made a plan to meet at Ortiz's house to return the Jeep and pick up the BMW. (38 RR 23-24, 75-76).

Security footage from Ortiz's neighbor's house captured the exchange of vehicles that evening. The footage showed Cortes pull up in the Jeep and exit the vehicle. (38 RR 76-78; 39 RR 44-45; SE 90-91). Cortes put all the items involved in the offense in a bag – the shirt and gloves that Appellant wore, the hoodie that she wore, the paper tags, and Dr. Hatcher's purse. (38 RR 78; SE 91). Delgado and Ortiz pulled up in the BMW moments later. (38 RR 76-77, 79). Ortiz carried Cortes's son from his Jeep to the BMW while Delgado and Cortes talked at the rear of the Jeep. (38 RR 79-80; SE 91). Delgado put Dr. Hatcher's purse over her shoulder and surveyed all the items from the offense. (38 RR 79-80; SE 91). Ortiz gave Cortes a hug and swung her around, then got into his Jeep and drove away. (38 RR 81).

After Delgado and Cortes left, they drove to a parking garage in Dallas and exchanged the BMW for Delgado's Lexus. (38 RR 81). They later went to Cortes's grandmother's house, where they burned the clothing, paper tags, and the contents of Dr. Hatcher's purse. (38 RR 82).

As promised, Delgado paid Cortes $500 for driving Appellant to kill Kendra Hatcher. (38 RR 83-84; SE 110). The day after the offense, Delgado gave Appellant Kush (a form of marijuana), cocaine, and money for killing Kendra Hatcher. (38 RR 67, 88).

E. The police investigation

DPD Detective Eric Barnes was assigned as the lead detective in the investigation of Dr. Hatcher's murder. (39 RR 41-42). Based on Saad's 911 call, Detective Barnes was looking for a black Jeep Cherokee as potentially being involved in the offense. (39 RR 43-44). On the first day of his investigation, Detective Barnes obtained the security footage from the parking garage and identified the vehicle of interest. (39 RR 43-44). A still image of this vehicle was released to the media, and the following day, after he saw the news coverage, Ortiz contacted DPD. (38 RR 24-27; 39 RR 44). Ortiz notified the police that the Jeep Cherokee he saw on the news belonged to him, and he was brought in for questioning. (38 RR 27; 39 RR 44). Ortiz identified the vehicle as his based on the distinctive rims, pattern of hood damage, and missing bumper cap. (38 RR 24-27; 39 RR 44). He told the police that he had loaned the vehicle to his friend, Brenda Delgado, the previous day. (38 RR 27-28; 39 RR 44). He told them where the Jeep was located and gave them consent to search it. (38 RR 27).

Delgado was picked up and brought in for questioning on September 4, 2015. (39 RR 46, 69). Delgado was very prepared for her police interview, and Detective Barnes thought her story sounded rehearsed. (39 RR 46). She provided an alibi during the time of the offense and even presented a receipt from Chili's, in pristine condition, in support of her story. (39 RR 46). She adamantly denied driving the Jeep and told Detective Barnes that her friend, Crystal Cortes, had driven it that day. (39 RR 46-47). Detective Barnes had a strong hunch that the offense was the result of a love triangle that went bad and that Delgado was involved, but because he did not have enough evidence to detain or charge her, Delgado was released. (39 RR 69-70). Shortly after her release, Delgado fled to Mexico.[4] (39 RR 69).

Detective Barnes got Cortes's phone number from Delgado and brought Cortes in for questioning the same day, on September 4, 2015. (38 RR 88; 39 RR 47). Cortes also seemed eager to talk to Detective Barnes, but it did not take long during questioning for her story to fall apart. (39 RR 47-48). According to Detective Barnes, the story she told them was not believable and did not add up with the information and evidence they had. (39 RR 48). Each time Detective Barnes pressed Cortes, she changed her story a little bit. (39 RR 48-49). Eventually, she admitted to being part of the offense as the driver, and she was arrested and charged with capital murder. (39

[4] After Cortes and Appellant were arrested and charged, DPD worked with the FBI and U.S. Marshalls to extradite Delgado from Mexico so that she could also be tried for her role in the capital murder of Dr. Hatcher. (39 RR 100).

RR 49). The police continued to talk to her over the next several weeks, while she was in jail. (39 RR 49). During one of her interviews, Cortes admitted that she knew the shooter and his name was "Kris." (38 RR 89-90; 39 RR 49, 52). She provided a physical description of him, including a description of his distinctive dreadlocks and a scar he had on his right hand. (38 RR 90-92, 214-15; 39 RR 49-51; SE 221-22). She told the police that the shooter drove a blue Chrysler Sebring with a black top and Tennessee license plates. (38 RR 89-90, 214-15; 39 RR 52; SE 192). She also identified the area of town where he lived or was known to hang around. (38 RR 214-15; 39 RR 52).

On September 10, 2015, Ortiz's Jeep Cherokee was photographed and processed at the DPD Auto Pound. (37 RR 88-82; SE 92-106). Inside the vehicle, in the center console area, the police found a Sonic receipt from September 2, 2015 at 3:53 p.m. (37 RR 92-94; SE 103-07).

On September 16, 2015, Delgado's white Lexus was seized and processed at the DPD Auto Pound. (38 RR 137-38). The police collected gloves, binoculars, and a baseball bat from inside the vehicle. (38 RR 139-45; SE 115-32).

F. Apprehension of Appellant and the murder weapon

Law enforcement used information from the cell phones of Cortes and other individuals suspected to be involved in the offense to identify a common number that

they believed belonged to the shooter: 214-721-5863.[5] (38 RR 160-61, 166-68, 215-16). They then obtained a warrant to "ping" the phone and determine its location. (38 RR 216). The cell phone was located in an apartment complex in South Dallas, in the same area where Cortes claimed the shooter lived. (38 RR 217). On October 1, 2015, several FBI agents went to the apartment complex where the phone was pinging and began to look for the vehicle they believed was driven by the user of the phone, a blue Chrysler Sebring. (38 RR 217-18). Once they located the vehicle, the agents waited and observed. (38 RR 218).

About thirty minutes later, Appellant, who matched the description of the shooter given by Cortes, came out of an apartment and entered the vehicle. (38 RR 218, 222). As Appellant began to drive away, the location of the phone ping traveled along with the vehicle. (38 RR 219). He drove a few blocks away to a nearby complex and parked the vehicle, and the location of the phone ping stopped at the location where he parked. (38 RR 220). Appellant got out of his vehicle and was met in the parking lot by one male and one female. (38 RR 220). Officers approached the vehicle and asked the three individuals for their identification. (38 RR 220). The officers noticed that there was a cell phone sitting in plain sight on the trunk of the vehicle.

[5] Metro PCS only sells prepaid accounts and does not do credit checks or verify identification, so an individual can provide any subscriber information they want when they activate an account. (38 RR 148). The subscriber information provided for this account was Kasino Jackson, 7272 Marvin D. Love Freeway in Dallas, Texas. (38 RR 151, 187). This address is in an area in South Dallas where the Surrey Row and Mandalay Palms apartment complexes are located. (38 RR 187; 39 RR 68).

(38 RR 221). During this interaction, Detective Barnes called the number they were pinging pursuant to the warrant, and the phone sitting on the trunk of the vehicle rang. (38 RR 221). All three individuals were brought in for questioning. (38 RR 221-23).

Detective Barnes conducted Appellant's recorded interview at the police station. (39 RR 52-56; SE 230). Appellant told Detective Barnes that he did not know his way around town because he had just recently moved to Dallas and only hung out in one general area near his apartment. (39 RR 58-60; SE 230). He repeatedly denied knowing Crystal Cortes or Brenda Delgado. (39 RR 58-59; SE 230). Throughout the interview, he showed a lack of emotion or sympathy and was more concerned about a basketball game than someone being murdered. (39 RR 62; SE 230).

During Barnes's interview with Appellant, DPD Detective Scott Sayers executed a search warrant on Appellant's blue Chrysler Sebring with the assistance of ATF Agent Dan Kaase and his explosive-detection canine, Titan.[6] (38 RR 227, 231, 233; 39 RR 7-9, 65). They first searched the exterior of the vehicle, and there were no visible changes of behavior by Titan. (38 RR 234). Inside the vehicle, Titan immediately showed a change in behavior as he sniffed around the open ashtray area

[6] Agent Kaase and Titan assist federal, state, and local law enforcement in the detection of explosive materials and ballistic evidence. (38 RR 228). Titan is trained to sniff up to a combination of 19,000 explosive odors, including military, commercial, and homemade explosives and components thereof. (38 RR 229, 237-38).

of the console and up toward the top of the windshield. (38 RR 235; 39 RR 10-11). Detective Sayers asked why Titan was sniffing up toward the windshield, and Agent Kaase explained that a trace odor, such as gunshot residue, is airborne and moves toward where the air can escape, so Titan was likely following the scent as it traveled. (39 RR 11). Titan then sat, giving an alert that he had detected an explosive odor. (38 RR 235; 39 RR 10-11; SE 200-01). When given the command to search again, Titan threw his nose up toward the roof line and then straight back down to the area where there was open ashtray in the center console. (38 RR 235; 39 RR 11; SE 200-01).[7] Detective Sayers looked inside the ashtray, but he did not see anything. (39 RR 12). Detective Sayers then noticed that the plastic area to the right of the console was loose and coming away, so he pulled the plastic back and found a .40 Smith & Wesson gun hidden inside. (39 RR 12-14; SE 201-08, 213).

Susan Kerr, a firearms examiner with DPD, examined the .40 Smith & Wesson found in Appellant's vehicle and compared it to other evidence found at the scene of Dr. Hatcher's murder. (39 RR 102, 106-07). Kerr confirmed that the magazine found at the crime scene next to Dr. Hatcher's body would fit and could be used to fire the gun found in Appellant's vehicle. (39 RR 107-08; SE 71, 213). Kerr also confirmed

[7] Agent Kaase also had Titan search the backseat and trunk of the vehicle, and Titan gave no alerts on those areas of the car. (38 RR 236).

that the fired cartridge case found on the floorboard of Dr. Hatcher's vehicle was fired from the gun found in Appellant's vehicle. (39 RR 111-12; SE 75).[8]

About twelve hours into Appellant's police interview, Detective Barnes was notified by Detective Sayers that the gun they found in Appellant's vehicle was a match to the fired cartridge case that was found at the murder scene. (39 RR 65). When Detective Barnes confronted Appellant with this information, there was a noticeable change in his demeanor. (39 RR 65). Appellant claimed he bought the gun from Cortes after the offense, but the date he gave was when Cortes was already in jail. (39 RR 66, 73-74). Eventually, Appellant admitted to being present during the murder, but he claimed Cortes was the shooter. (39 RR 72). He told Detective Barnes that it was supposed to be just a robbery and that he was struggling with Dr. Hatcher over her property when Cortes backed up the vehicle and shot her. (39 RR 72).

Appellant was arrested for capital murder on October 2, 2015. After he was booked into the Dallas County Jail, he made a phone call to his girlfriend, Mericka Swint. (39 RR 39-40, 84; SE 228, 270). During the call, Swint asked Appellant why he would keep the gun, and his response was: "I don't know, man. Stupid as fuck." (39 RR 85; SE 228). Later during the call, Swint said: "If you shot that girl with that gun,

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[8] Kerr also test fired the weapon and confirmed that her fired bullet had the same class characteristics as the fired bullet recovered from the scene, but there were not enough individual characteristics to positively match it to the gun. (39 RR 109-11; SE 61, 73).

you should've…threw it away or something." (39 RR 86; SE 228). Appellant replied: "I know, man, I know. Too late now though." (39 RR 86; SE 228).

G. Cell phone evidence

The police obtained Appellant's and Cortes's cell phone records from their service provider, Metro PCS. (38 RR 149-50; SE 143-44). They also did an extraction of all the data stored on Appellant's LG phone, Cortes's LG phone, and Delgado's iPhone 6 – a process commonly referred to as a "phone dump." (38 RR 170-72, 175-78; SE 108, 140-41, 146-150). Michael Freeman, a senior criminal intelligence analyst with DPD, utilized the call-detail records and extraction reports to summarize the cell phone activity of Appellant, Cortes, and Delgado around the time of the offense. (38 RR 180-202; SE 153-162). Officer Freeman also created a map diagram of the cell towers that Appellant's and Cortes's phones hit on the day of the offense. (38 RR 200-02; SE 162).

The records showed that on September 2, 2015, Appellant's phone hit on the tower near the Jack-in-the-Box located at I-35 and Royal Lane at 10:26 a.m., and Cortes's phone hit near the same location at 10:34 a.m. (38 RR 202, 204-05; SE 162). At 11:31 a.m., Appellant's cell phone hit on a tower near Dr. Hatcher's apartment, and Cortes's phone hit near the same location at 11:37 a.m. (38 RR 202-03, 205; SE 162). Appellant's phone was inactive from 3:29 p.m. until 7:47 p.m., and Cortes's phone was inactive from 4:17 p.m. until 7:40 p.m., suggesting that they both turned

their phones off during this time. (38 RR 203-04, 205-06; SE 162). When Cortes turned her phone back on after 7:40 p.m., it hit on a tower close to Dr. Hatcher's apartment. (38 RR 203; SE 162). At 7:47 p.m., Cortes received a call from Ortiz's cell phone. (38 RR 203-04; SE 162). Ortiz's phone hit on a cell tower on North Josey Lane in Carrollton when this call was made. (38 RR 204; SE 162).

The cell phone records also reflected frequent interactions between the parties around the time of the offense. Delgado contacted Cortes 131 times via phone call or text, and Cortes contacted Delgado 95 times via phone call or text. (38 RR 206-07; SE 162). Appellant contacted Cortes 111 times via phone call or text, and Cortes contacted Appellant 46 times via phone call or text. (38 RR 207; SE 162). The contact saved as "Mustang" in Appellant's phone contacted Appellant 23 times via phone call or text, and Appellant contacted "Mustang" one time via phone call or text.[9] (38 RR 207; SE 162). The last text that Appellant sent to Cortes was on September 4, 2015, and it read: "Wats up wit da kush?" (38 RR 185-86; SE 153, 155).

From Cortes's cell phone extraction, the police found two images dated September 4, 2015: a selfie of Cortes and Delgado in Delgado's Lexus, and a photo of Cortes holding the money she was paid by Delgado in the shape of a heart. (38 RR 196-97; SE 190-191).

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[9] Appellant started communicating with the contact labeled "Mustang" around the same time he met Delgado. (38 RR 119, 121). The evidence showed that Delgado frequently drove her cousin's Mustang, so this was believed to be an alias number for Delgado. (38 RR 37, 94-95, 115, 119).

From Delgado's cell phone extraction, the police found the following images:

- screenshots of a travel reservation and receipt for a trip that Dr. Paniagua booked with another woman, saved on March 31, 2015;
- a screenshot of a text message exchange between Dr. Paniagua and a woman he was dating named Mirlande, saved on March 31, 2015;
- a profile photo of Dr. Paniagua, saved on May 24, 2015;
- a screenshot of Dr. Paniagua's iPhone location, saved on May 25, 2015;
- a screenshot of a Mitsubishi Galant that Delgado and Cortes had discussed purchasing to use during the offense, saved on August 25, 2015;
- a photo of Dr. Paniagua and Dr. Hatcher, saved on June 15, 2015; and
- a note containing Dr. Paniagua's email address and password.

(37 RR 124-27; 38 RR 45-46, 198-200; SE 80-85, 182-88).

Appellant's cell phone extraction records showed that, the day after the offense, he conducted web searches for "killings in Dallas," "Woman murdered in Uptown Dallas parking garage," and "Dallas news today." (38 RR 188-90; SE 161). He also searched for "gun shop in 75237," his zip code, and "Gold & Gun Swap Shop" in Dallas. (38 RR 189; SE 161). Over the next two weeks, he continued to conduct web searches for "Dallas homicide" and for specific news articles pertaining to the murder of Dr. Kendra Hatcher. (38 RR 190-92; SE 161). His phone also contained images of the same type of gun that was used in the offense. (38 RR 192-94; SE 170-71).

After hearing all of the foregoing evidence, the jury found Appellant guilty of capital murder as charged in the indictment. (40 RR 47).

THE STATE'S PUNISHMENT EVIDENCE

During the punishment phase, the State presented evidence of Appellant's criminal history, which began when he was a juvenile and was ongoing up until the time of the instant offense. The testimony and evidence showed the following:

- 3/21/01: Appellant (a juvenile) committed theft of a Ford automobile from Enterprise Rental, evading arrest by vehicle, reckless endangerment against the citizens of Shelby County, unlawful possession of a weapon, to wit: a pistol, leaving the scene of an accident, and reckless driving (SE 385);

- 4/5/01: Appellant was removed from the custody of his parents and placed under the care and supervision of the Youth Services Bureau (SE 385);

- 10/17/01: Appellant was removed from the Youth Services Bureau and custody was restored to his parents (SE 387);

- 9/19/02: Appellant committed burglary of the habitation of Tina Fisher with intent to commit theft in Shelby County, Tennessee (SE 342);

- 8/15/03: Appellant pleaded guilty to burglary and was given two years' probation, judicial diversion (SE 342);

- 12/29/03: Appellant evaded arrest in Tipton County (42 RR 147-48);

- 12/30/03: Appellant committed aggravated robbery of Cory Turner, aggravated assault of Cory Turner, and aggravated assault of Lequite Turner in Lauderdale County, Tennessee (SE 343);

- 7/2/04: Appellant committed aggravated robbery of Tracey Denton in Shelby County, Tennessee (SE 342);

- 7/15/04: Appellant was arrested and signed a statement admitting his participation in the aggravated robbery of Tracey Denton; in the statement, Appellant described how he and his cohort used a vehicle he had stolen to commit the robbery (41 RR 25-27; SE 342, 349);

- 7/28/04: Appellant's judicial diversion in the burglary case was revoked and he was ordered to serve the remainder of his two-year sentence in the Shelby County Corrections Center (SE 342);

- 3/2/05: Appellant pleaded guilty to facilitation of aggravated robbery of Cory Turner, aggravated assault of Cory Turner, and aggravated assault of Lequite Turner (SE 343);

- 3/8/05: Appellant was sentenced to three years' imprisonment in the Tennessee Department of Corrections ("TDOC") for facilitation of aggravated robbery and two counts of aggravated assault (SE 343);

- 9/23/05: Appellant pleaded guilty to aggravated robbery of Tracey Denton and was sentenced to eight years' imprisonment in TDOC (SE 342).

The evidence showed that, after Appellant served his eight-year sentence in the aggravated robbery case and was released from prison, it was not long before he was arrested again. In March 2013, Special Agent Brent Hill was working traffic enforcement for the Dyersburg City Police Department along Highway 51, north of Memphis, Tennessee. (41 RR 32-37). Agent Hill regularly set up on Highway 51 because he had learned through his training and experience that many criminals preferred to travel on Highway 51 to avoid Interstate 40 and other roads with heavy traffic. (41 RR 37-38). On March 19, 2013, Agent Hill pulled over a white Ford Mustang driven by Appellant for a traffic offense. (41 RR 39-40). When Agent Hill asked for Appellant's license, he presented an identification card rather than a driver's

license and explained that he did not have a license because it was suspended. (41 RR 42-43). He also admitted that he had been convicted of the felony offense of aggravated robbery. (41 RR 56). Agent Hill confirmed through dispatch that Appellant's license was suspended, and he also learned that Appellant had been arrested five times previously for driving with a suspended license. (41 RR 43). Appellant was placed under arrest. (41 RR 44).

As Agent Hill approached the passenger side of the vehicle to speak to the passenger, Cassandra Felix, he smelled the odor of marijuana. (41 RR 44-45). Felix was directed to exit the vehicle, and Agent Hill deployed his narcotics-detector dog, Pyro, to assist him with a search of the vehicle. (41 RR 46-47). In the trunk of the vehicle, he found a gallon-size Ziploc bag containing marijuana residue. (41 RR 47). During the search, Agent Hill also noticed an alteration to the front passenger side carpet in the floorboard. (41 RR 48-49). Agent Hill pulled back the carpet and found a handgun hidden underneath. (41 RR 50-51). The mat in between the floor of the vehicle and the carpet that acts as a sound barrier had been pried up, and a custom holster had been created for the gun to sit in. (41 RR 51-53). The mat and carpet had then been re-secured to the vehicle using Velcro strips. (41 RR 50). Ultimately, Appellant was charged with felon in possession of a firearm. (41 RR 55). At the time of this capital murder trial, Appellant had an active warrant for his arrest for failure to appear. (41 RR 55).

The State's evidence showed that Appellant's criminal activity continued after he moved to Dallas from Memphis. During his police interview, Appellant admitted to Detective Barnes that he was selling drugs. (41 RR 66-67; SE 350). When asked when he last possessed a firearm, Appellant lied and stated that the last time he had a gun was in Memphis, before he came to Dallas. (41 RR 69-70; SE 350). He claimed he sold his gun to someone in Memphis after he picked up the felon-in-possession charge in Dyersburg. (41 RR 70; SE 350). From Appellant's phone dump, Detective Barnes found several text messages confirming that Appellant was dealing drugs and that he was trying to get a business started as a pimp. (41 RR 71-90; SE 351-356). There were numerous entries on his phone for the website Backpage, which is a black-market website used to solicit sex and promote prostitution. (41 RR 90; SE 160).

The police took pictures of Appellant's body tattoos at the time of his arrest. (41 RR 91). On his chest, Appellant had a tattoo that read "Life or Death," surrounded by money signs. (41 RR 91; SE 357). On his left side, Appellant had a tattoo of some type of revolver or semiautomatic handgun. (41 RR 92-93; SE 358). On his back, Appellant had a tattoo of an AK-47 that read "One Man Army." (41 RR 93; SE 382). While in jail awaiting trial for this offense, Appellant added bullet holes and smoke to the tattoo on his back. (41 RR 93-94; SE 361-362). Detective Barnes

testified that it is a major violation of the rules of the Dallas County Jail to tattoo yourself or have yourself tattooed while incarcerated. (41 RR 94).

In addition to evidence regarding Appellant's criminal history, the State presented testimony from Todd Harris, the Senior Warden at the Texas Department of Criminal Justice ("TDCJ") Polunsky Unit, a male maximum-security prison that houses the male death row inmates in Texas. (42 RR 6-7, 21, 26, 53, 62). Warden Harris was called to educate the jury about how inmates are classified and housed within TDCJ, the recreation and other services offered to inmates, and what prison life is like for an inmate in general population as opposed to an inmate who is on death row. (42 RR 6-37). Warden Harris explained that when a defendant is convicted and sentenced to serve time in TDCJ, he is initially sent to a receiving unit for diagnostic testing, classification, and unit assignment. (42 RR 8). Once the inmate is sent to his assigned unit, the classification committee at the particular unit assigns the inmate a custody level, housing assignment, and job assignment based on the inmate's sentence, institutional history, and particular needs. (42 RR 8). The classification process is ongoing throughout incarceration to make sure that the prison is meeting the inmate's needs. (42 RR 9). Additionally, because TDCJ staff cannot predict how a particular inmate is going to adjust to life in prison, it is also used as a tool to react to and control the inmate's behavior. (42 RR 36, 55).

Warden Harris explained the classification levels within TDCJ (G1 through administrative segregation) and explained that an inmate sentenced to life without parole who is not associated with a security threat group and does not have an institutional history of assaultive conduct would be classified as a "G3." (42 RR 9-12, 19-20, 60-62, 66). G3 inmates are housed with other G3 inmates, regardless of what offense they were convicted of, and they are permitted to walk from their housing to the chow hall without being escorted or shackled. (42 RR 13, 20, 61). Their movement around the unit is "controlled" in the sense that, even though they are not being escorted by a guard, someone knows where they left from and where they are going at all times. (42 RR 54). In Warden Harris's unit, G3's are housed in two-man cells with around 140 inmates per pod, and there is one guard per pod watching the 140 inmates. (42 RR 14). About 40% of the guards are females and 60% are males, and they all range in size and age. (42 RR 14, 20, 49). A pod is divided into three sections, and each section contains one day room with a maximum capacity of 48 inmates. (42 RR 17). The day room is kind of like a large living room, where the inmates hang out and watch television. (42 RR 17). They also have outside recreation yards where the inmates can play basketball and handball, lift weights, and run. (42 RR 18). The maximum capacity of the outside recreation yard is 320 inmates, guarded by one correctional officer in an elevated glass picket and one officer outside the gate. (42 RR 17-18). The unit offers several religious services per week and allows about 200

inmates to attend the service at one time. (42 RR 19). Recreation and church services tend to be popular events because the inmates get to see friends or fellow inmates who live in other buildings on the unit that they normally would not get to see. (42 RR 19).

Unlike those in the general population, inmates who are in administrative segregation and on death row are fed in their cell through a meal slot and are double escorted anywhere they go within the unit. (42 RR 27-28). They get two hours of recreation time per day and are allowed legal and personal visitation, but other than that they are generally in their cell for 22 hours a day. (42 RR 28, 33). Even though death row is the most secure area of the prison, there are still death-row inmates who commit violent and nonviolent infractions. (42 RR 33).

Despite their best efforts to control inmate behavior and provide a safe prison environment, staff members still have issues with inmates obtaining contraband and creating weapons. He explained how some inmates obtain contraband, such as drugs and cell phones, from correctional officers and through visitation. (42 RR 22-23). Because the inmates are not allowed to have cash, an inmate might pay for contraband by having their family send money to another inmate's family, by putting money on another inmate's books, by trading goods or sexual favors, or by attacking someone on another inmate's behalf. (42 RR 23-24). He also explained how some

inmates make weapons or shanks out of items that are available in the commissary or are components of items in their cell, like the toilet. (42 RR 25-26).

On cross-examination, Warden Harris agreed that he undergoes continuing education each year and reads publications about institutional programming and security systems that have been successful, as well as ones that have not so he can learn from other peoples' mistakes. (42 RR 40). He agreed that TDCJ runs one of the finest prison systems in the nation and that they do their best to provide a safe prison environment. (42 RR 44, 48). All TDCJ guards are sufficiently trained and receive continuing education each year. (42 RR 50, 72). Nonetheless, TDCJ is understaffed and its control of inmates is often more reactive than proactive. (42 RR 72, 74). Warden Harris agreed that studies have shown there is no correlation between the crime the inmate committed and their propensity for violence in prison. (42 RR 57-60, 75-76). He also agreed that studies have shown that an inmate's propensity for committing spontaneous acts of violence in prison declines above the age of 30, and inmates with a high level of family support and visitation have a lower propensity for violence or infractions while in prison. (42 RR 45, 67-68, 72). Regardless of the inmate's age, supervision level, or offense, he agreed that it is entirely up to the individual inmate as to how he is going to behave while incarcerated. (42 RR 73-74).

The State also presented victim-impact and victim-character evidence through the testimony of Dr. Hatcher's sister, Ashley Turner, and Dr. Hatcher's best friend

from dental school, Dr. Tammy Pantano. Turner testified that Dr. Hatcher was one of five children and they grew up in a small town outside of Springfield, Illinois. (41 RR 102-105; SE 364, 373). Dr. Hatcher was very involved in sports and other school activities, and she always strived for excellence in everything she did. (41 RR 106, 115-16; SE 365-66, 372, 374). Dr. Hatcher had a love for service, which started in high school. (41 RR 107-08). The family would travel to Missouri and local places to help build churches, and Dr. Hatcher would do Bible Studies for children in lower-income communities. (41 RR 108). Dr. Hatcher started speaking Spanish in high school and then became bilingual in college, where she majored in Spanish and minored in biochemistry. (41 RR 107). She spent her Christmas breaks in Ecuador or Spain giving medical treatment, and she spent her spring breaks working in various places for Habitat for Humanity. (41 RR 108, 114; SE 367-371). After dental school, she moved to Texas so that she could serve the Hispanic community. (41 RR 109). Dr. Hatcher did not have any kids of her own yet, but she had a special connection with all of her nieces and nephews. (41 RR 111; SE 376-77, 380). Turner described Dr. Hatcher as a person with a joyful, contagious laugh, who was full of life and love and gave everything she had to those around her. (41 RR 119, 122). Dr. Hatcher's family will never be the same as a result of her murder. (41 RR 120). Their older sister, Jamie, is suffering from PTSD and several physical illnesses that have manifested as a result of the murder. (41 RR 119-20).

Dr. Pantano, who met Dr. Hatcher during dental school, testified that they had many things in common and quickly became best friends. (41 RR 120-22). She described Dr. Hatcher as the most generous, giving friend that anyone could have. (41 RR 122). She was also an excellent dentist who was especially good with kids and had a way of putting her patients at ease. (41 RR 123). As a result of Dr. Hatcher's murder, Dr. Pantano does not feel safe and has a lot of rage and anger. (41 RR 126-26). Dr. Pantano was not able to do surgeries for six months after the offense because the sight of blood would trigger her. (41 RR 125). Although it is getting better, she will never be the same as a result of Dr. Hatcher's murder. (41 RR 125-26).

In rebuttal, the State presented victim-impact testimony from Dr. Hatcher's mother, Bonnie Jameson. Since Dr. Hatcher's murder, Jameson has had to seek counseling because she has nightmares every night and has constantly been re-living the garage scene herself. (43 RR 12). Jameson stated that Dr. Hatcher's murder has not only affected family and friends, but has also affected Jameson's retail business and her customers. (43 RR 13).

APPELLANT'S PUNISHMENT EVIDENCE

Appellant presented testimony from five detention officers who supervised him at the Dallas County Jail while he was awaiting trial for capital murder. Appellant was housed in a single cell for about two years due to the high-profile nature of his case, and then he was moved, at his request, to general population. (42 RR 79-81, 83-84,

96). All of the officers called to testify became acquainted with Appellant while he was housed in a single cell. (42 RR 79-80, 154-56, 166-68, 229-30). According to the officers, Appellant was quiet and kept to himself. (42 RR 81-82, 169, 232, 236). They did not have any problems with him. (42 RR 82, 159-60, 169, 233, 236). On cross-examination, one of the officers agreed that it is a major infraction in the jail to tattoo yourself or have yourself tattooed. (42 RR 175). He conceded that things like that happen all the time when the inmates are not being directly observed. (42 RR 175).

Through the testimony of seven family members, the jury was given a thorough picture of Appellant's family and life history. The testimony showed that Appellant's father, Kim Love, Sr., started dating Vicki Love in the early 1970s and they had two children together, Kim, Jr. ("Scooby") and Keyon. (42 RR 179-80). Kim and Vicki split up in 1977, and Kim began dating Vea Love. (42 RR 101-02, 180-81). At that time, Vea had a daughter named Meisha. (42 RR 102-03, 242-43). Kim and Vea then had two children together, Appellant and Kasey. (42 RR 104-05). Kim, Vea, Meisha, Appellant, and Kasey moved to Memphis when Appellant was around six months old. (42 RR 100-01, 103). Scooby and Keyon visited them during the summer and also lived with them in Memphis for a short period of time. (42 RR 185, 195, 199-201, 272). Despite their split, Vicki and Kim maintained a good relationship and were in constant contact over the years about their children. (42 RR 180-81, 186-187).

Vea and Kim had a very volatile relationship and separated many times. (42 RR 105-07, 222, 244-45, 271-72). When they would separate, the kids were often split up. (42 RR 111, 223, 245). Appellant's sister, Meisha, testified that it was hard on the kids and she could tell that a piece of Appellant was gone each time their parents split up. (42 RR 246-47). Appellant was a good student until about 5th grade. (42 RR 109-10). Around the 7th or 8th grade, Appellant's grades got worse and he started getting suspended for being tardy and skipping school. (42 RR 112). Around this time, he also became involved in the juvenile system for stealing a car. (42 RR 112-13, 273). Both Vea and Kim attributed Appellant's troubles to them splitting up, moving around, and working a lot. (42 RR 110, 273-74).

Shortly after Appellant started getting in trouble with the law, he dropped out of school and started painting with his father. (42 RR 115, 119, 188, 208, 273). He was dating Siccoria Hite ("Corey") and she got pregnant. (42 RR 116, 119, 258, 261). Appellant was in prison for robbery when Corey gave birth to their daughter, Keyrah, in 2004. (42 RR 119-20, 261). Corey and Appellant broke up, but she remained close to Appellant and his family. (42 RR 263). She even brought Keyrah to visit him in prison multiple times. (42 RR 261).

Once Appellant was released from prison onto parole, he spent a lot of time with Keyrah and did everything he could to make up for not being there when she was born. (42 RR 209, 261-62). Both Vea and Corey described Keyrah as a "daddy's

girl." (42 RR 122, 262). Appellant started painting with his father again and began dating Merika Swint. (42 RR 124). Around this same time, Vicki and Kim rekindled their romance. (42 RR 186-87). Vicki moved to Memphis, and she and Kim got married in August 2008. (42 RR 185, 187).

In 2012, Appellant and Merika had a son together, Kamari. (42 RR 125). When Kamari was about one, Appellant and Merika moved to Dallas. (42 RR 125, 217). While living in Dallas, they had another child together, a daughter named Kali. (42 RR 125, 264). All of Appellant's family members described Appellant as a good father, uncle, and son. (42 RR 122, 209, 226-27, 251-53, 261-62, 264, 266, 275-77, 279). Appellant has a large, close-knit family and many of them live in close proximity to each other in Memphis. (42 RR 128-29, 189-90, 220, 243, 275-76). Appellant was close with his siblings and extended family while growing up and still is today. (42 RR 108, 128-29, 243). Appellant's family members testified that, if Appellant were to be sentenced to life in prison, they would continue to love and support him, would visit him regularly, and would make sure he is successful in the prison system. (42 RR 111, 191-92, 211-12, 227-28, 254, 263).

On cross-examination, Vea agreed that she taught her kids right from wrong and set standards for them to follow. (42 RR 138-39). Likewise, Vicki agreed that Kim was a good father and instilled the proper values in his children. (42 RR 196). Vea confirmed that Appellant's brother, Keyon, is a police officer and that none of

Appellant's siblings have ever been convicted of a felony offense. (42 RR 136-37). When Appellant started to get in trouble with the law, both Scooby and Keyon counseled him and encouraged him to get back on the right path. (42 RR 196-97, 213, 215). Kim confirmed that Appellant was not physically or sexually abused; he always had food and shelter; there was no domestic violence in the household; and he does not have any mental disorder or defect. (42 RR 280, 290). Appellant did not admit his involvement in this capital murder to his family; they found out from the internet and his attorneys. (42 RR 133-35).

SUMMARY OF THE ARGUMENT

Issues 1-21: The trial court properly denied Appellant's challenges for cause against 16 prospective jurors and five seated jurors. All of the denials were proper, and Appellant has not shown that he was denied the use of a statutorily provided peremptory challenge.

Issues 22-23: Appellant's argument that he was deprived of a lawfully constituted jury, in violation of his federal and state rights, lacks merit. Appellant has failed to prove that any of the trial court's rulings on any of the challenges resulted in the seating of a juror who was biased or prejudiced.

Issue 24: The evidence is legally sufficient to support Appellant's conviction for capital murder. The evidence presented at trial showed that Appellant shot Kendra Hatcher in a murder-for-hire scheme and stole her belongings to make the offense

look like a robbery gone awry. Although Appellant's version of events conflicted with that of his accomplice, Crystal Cortes, it was the jury's duty to resolve conflicts in the testimony and to weigh the evidence. Additionally, should Appellant's claim be construed as a challenge to the sufficiency of the corroborating evidence under the accomplice-witness rule, the non-accomplice evidence tends to connect Appellant to the offense and therefore sufficiently corroborates Cortes's testimony.

Issue 25: Texas courts no longer examine the factual sufficiency of the evidence. As such, Appellant fails to present a valid claim for review.

Issues 26-28: Brenda Delgado's statements to Jennifer Escobar, Moses Martinez, and Crystal Cortes attempting to recruit them to murder Kendra Hatcher were admissible as statements against penal interest and alternatively, with regard to Cortes, as statements of a co-conspirator. As such, the trial court did not abuse its discretion by overruling Appellant's hearsay objections and admitting this testimony.

Issues 29-30: At the time of Appellant's arrest, the police were justified in conducting a warrantless search of Appellant's vehicle pursuant to the automobile exception because they had probable cause to believe the vehicle contained evidence of a crime. There was no requirement that the warrantless search of Appellant's vehicle occur contemporaneously with its lawful seizure; the probable cause that existed at the time of arrest still existed later at the police auto pound. Further, the search warrant obtained prior to the subsequent search of Appellant's vehicle was

sufficient to state probable cause. Accordingly, the trial court did not err in overruling Appellant's motion to suppress.

Issues 31-32: The trial court did not abuse its discretion by overruling Appellant's objections to victim-impact testimony and victim-character photographs offered by the State during the punishment phase of trial. The trial court admitted the complained-of evidence for a proper purpose and placed appropriate limits on the testimony.

Issue 33: The trial court did not abuse its discretion by admitting State's Exhibits 176 and 178, photographs of Appellant, because the probative value of the photographs was not substantially outweighed by their prejudicial effect or the needless presentation of cumulative evidence.

Issues 34: The evidence showed that Appellant committed the instant capital murder with premeditation and forethought, carried it out methodically and brutally, exhibited a callous disregard for human life, and showed no remorse or contrition for his actions. From this evidence, as well as the evidence of Appellant's lengthy criminal history, a rational jury could find that Appellant would constitute a continuing threat to society. Therefore, the evidence is sufficient to support the jury's finding of future dangerousness.

Issue 35: This Court does not apply a factual-sufficiency review to the jury's answer to the future-dangerousness special issue. Thus, Appellant fails to present a valid claim for review.

***Issue 36*:** Appellant's challenge to the punishment charge is multifarious and inadequately briefed and, therefore, presents nothing for review.

***Issues 37-46*:** Appellant's admittedly meritless federal constitutional challenges to the Texas death penalty statute are presented only to preserve the complaints for federal habeas review. Appellant invites this Court to revisit its prior holdings against his position, but he provides no new authority for this Court or the State to address.

ARGUMENT

RESPONSE TO ISSUES 1-21

The trial court properly denied all of Appellant's challenges for cause.

In Issues one through 21, Appellant contends the trial court erred in denying his challenges to 16 prospective jurors and five jurors who served. In so doing, Appellant claims, the trial court violated statutory and constitutional law by erroneously causing him to use all 15 peremptory strikes plus two additional strikes on persons who should have been removed for cause. Moreover, he contends the trial court forced him to accept an objectionable juror after denying his request for an additional strike. (Appellant's Br. at 36-108).

The trial court properly denied all of Appellant's challenges for cause. Thus, his contentions are without merit and this Court should overrule them.

APPLICABLE LAW

A prospective juror may be challenged for cause if, among other reasons, he possesses a bias or prejudice in favor of or against the defendant or he possesses a bias against an aspect of the law upon which the State or the defendant is entitled to rely. *See* Tex. Code Crim. Proc. Ann. art. 35.16(a)(9), (b)(3), (c)(2); *Threadgill v. State*, 146 S.W.3d 654, 667 (Tex. Crim. App. 2004). A "bias against the law" is the refusal to consider or apply the relevant law. *Sadler v. State*, 977 S.W.2d 140, 142 (Tex. Crim. App. 1998). The test is whether the bias or prejudice would substantially impair the prospective juror's ability to carry out his oath and instructions in accordance with the law. *Threadgill*, 146 S.W.3d at 667.

An appellant has the burden of establishing that his challenge for cause is proper. *See Feldman v. State*, 71 S.W.3d 738, 747 (Tex. Crim. App. 2002). Before a prospective juror can be excused for bias, the law must be explained to him and he must be asked whether he can follow that law regardless of his personal views. *Threadgill*, 146 S.W.3d at 667. An appellant does not meet his burden of establishing that his challenge for cause is proper until he has shown that the veniremember understood the requirement of the law and could not overcome his prejudice well enough to follow it. *See Feldman*, 71 S.W.3d at 747.

When reviewing a trial court's decision to deny a challenge for cause, the appellate court examines the entire record to determine if there is sufficient evidence to support the ruling. *Feldman*, 71 S.W.3d at 744. The appellate court reviews a trial court's ruling with "considerable" or "great" deference because the trial judge is in the best position to evaluate the prospective juror's demeanor and was present to observe the juror and listen to his tone of voice. *Saldano v. State*, 232 S.W.3d 77, 91 (Tex. Crim. App. 2007); *Threadgill*, 146 S.W.3d at 667. Particular deference is given when the prospective juror's answers are vacillating, unclear, or contradictory. *Threadgill*, 146 S.W.3d at 667. The appellate court reverses a trial court's ruling on a challenge for cause "only if a clear abuse of discretion is evident." *Colburn v. State*, 966 S.W.2d 511, 517 (Tex. Crim. App. 1998). When the venireperson is persistently uncertain about his or her ability to follow the law, the reviewing court does not second-guess the trial court. *Id.*

To prevail on a claim of erroneous denial of a challenge for cause, the defendant must object to the trial court that he is compelled to try his case with at least one individual on the jury who he would have removed with a peremptory challenge had one been available to him. Harm from the erroneous denial of a defense challenge for cause occurs under the following circumstances: (1) a defendant uses a peremptory challenge to remove a veniremember whom the trial court should have excused for cause at the defendant's request, (2) the defendant uses all of his

statutorily allotted peremptory challenges, and (3) the defendant unsuccessfully requests an additional peremptory challenge which he claims he would use to remove another veniremember whom he identifies as "objectionable" and who actually sits on the jury. *Saldano*, 232 S.W.3d at 91. When this occurs, the trial court's erroneous denial of a challenge for cause harms the defendant by wrongfully depriving him of at least one of his statutory peremptory challenges that he could have used to remove the juror whom he has identified as objectionable. *Id.*

The parties asserted their challenges for cause and peremptory challenges at the conclusion of each prospective juror's individual voir dire. Appellant exhausted all 15 of his statutory peremptory strikes and two additional strikes granted by the court. (25 RR 80-81; 27 RR 73-74; 29 RR 67-68). The court denied Appellant's request for a third additional strike to exercise on Zachary Niesman, whom Appellant identified as objectionable. (29 RR 154-55). Since Appellant received two extra peremptory challenges, he must show the trial court erroneously denied at least three of his challenges for cause to the other veniremembers identified in issues one through 21. *See, e.g., Saldano,* 232 S.W.3d at 93 (noting the defendant would have to show the trial court erroneously denied his challenges for cause to three of the complained-of venire members because he received two extra peremptory strikes). He fails to do so.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S CHALLENGES FOR CAUSE

On appeal, Appellant asserts the following venirepersons were objectionable jurors: Calvin Thomas, Casey Rackard, Gregory Kays, Michelle Queen, Katrina Kohn, Catherine Wiley, Juan Tijerina, Monte Rose, Catherine Parker, Casey Theis, Barbra Applebaum, James Roman, Sandra Johnston, Stacy Summers, Donna Foster, Kelly Stejskal, Zachary Niesman, Robyn Byers, Dazerick Parham, David Slear, and Christopher Taylor. (Appellant's Br. at 36-106). The first 16 complained-of venirepersons, however, were not seated on the jury, and they do not meet the test for harm set out above for identification of an objectionable juror who served on the jury. *See Sells v. State*, 121 S.W.3d 748, 758 (Tex. Crim. App. 2003) (to show harm in the improper denial of a challenge for cause, an appellant must identify an objectionable juror who served on the jury).

The State rejects Appellant's persistent claims in several of his issues in which he argues the State improperly persuaded jurors' views on the death penalty by asking if the jurors could follow the law. *See, e.g.*, Appellant's Br. at 45, 48-49, 61, 64, 70, 76. Contrary to Appellant's claims, both sides during voir dire are entitled to inform the jurors of the law, and elicit whether the juror can, in fact, follow the law. *See* Tex. Code Crim. Proc. Ann. art. 35.16(a)(10), (b)(3), (c)(2) (prospective juror's bias or prejudice against the law may render him unfit to serve as a juror); *see, e.g.*, *Easley v. State*, 424 S.W.3d 535, 537-38 (Tex. Crim. App. 2014). Appellant's interpretation of

the State's questions is inaccurate, and he fails to show each juror's opinion was influenced.

Issue 1: Calvin Thomas

Appellant exercised his first peremptory strike against Calvin Thomas. (5 RR 155). At trial, Appellant challenged Thomas because he would not hold the State to its burden of proving every element of the offense, specifically, venue. (5 RR 154). In response, the prosecutor argued that Thomas, a self-proclaimed "rules follower," indicated he would follow the law after learning the State's burden of proving each element. (5 RR 154). The prosecutor further stressed that because defense counsel did not tell Thomas what the law required or ask whether he could follow Texas's venue statute, the challenge was not valid. (5 RR 154-55).

On appeal, Appellant recites numerous reasons in support of his claim that the trial court erred in denying his challenge. (Appellant's Br. at 37-40). Some, but not all, of the reasons cited in the appellate brief are:

- Thomas was more inclined to believe a police officer's testimony over that of another witness. (Appellant's Br. at 37).
- Thomas circled 9 out of 10 on his questionnaire as to how strongly he supported the death penalty. (Appellant's Br. at 37).
- Thomas believed that "if all the circumstances lead up to it, to me it's cut and dry" and it was "cut and dry if the defendant commits violent acts." (Appellant's Br. at 38, citing 5 RR 129).

- Thomas thought that every person who commits a murder during the commission of a robbery should be subject to the death penalty. (Appellant's Br. at 38, citing 5 RR 129).

- Thomas thought the death penalty was used too seldom and if the case qualified as a capital case, the maximum punishment should be imposed. (Appellant's Br. at 38-39, citing 5 RR 134).

Appellant's above complaints were not preserved for review because he did not raise them at trial. *See* Tex. R. App. P. 33.1(a) (providing that a timely and specific trial objection is a prerequisite to presenting a complaint for appellate review).

Appellant also contends Thomas would not hold the State to its burden of proving every element of the indictment. (Appellant's Br. at 39). In support, Appellant cites Thomas's testimony during defense questioning that he would still find a defendant guilty even if the indictment alleged the wrong county. (5 RR 139). Thomas made such statements to defense counsel during just one exchange. (5 RR 136-39).

The trial court did not abuse its discretion in overruling Appellant's challenge to Thomas. Appellant did not raise a proper legal challenge to Thomas, because venue is not an element the State was tasked with proving beyond a reasonable doubt. *See Schmutz v. State*, 440 S.W.3d 29, 34-35 (Tex. Crim. App. 2014) (holding venue is not an element of the offense that the State holds the burden of proving beyond a reasonable doubt); *see also* Tex. Penal Code Ann. § 1.07(22) (defining "elements of offense," and venue is not included); Tex. Code Crim. Proc. Ann. art. 13.17 (stating venue must be proven by a preponderance of the evidence).

Even if venue were an element the State held the burden of proving beyond a reasonable doubt, the record supports the trial court's denial of Appellant's challenge. Thomas unequivocally stated he follows the law and the constitution. (5 RR 90-92, 94; Thomas Questionnaire at 3). He confirmed he would hold the State to its burden of proving every element beyond a reasonable doubt. (5 RR 104, 117, 120). Contrary to Appellant's instant claim, Thomas specifically declared that if the offense happened in Tarrant County, the defendant would be entitled to a not-guilty verdict. (5 RR 100-01).

Thomas's statements at issue to defense counsel, in which he appeared confused by counsel's inquiries, were not emphatic refusals to hold the State to its burden. (5 RR 138-40). Rather, counsel posed a hypothetical question to Thomas and asked him what he thought. (5 RR 139). Thomas told counsel that, regarding "being out of area," if he believed beyond a reasonable doubt that the defendant was guilty, he would still find the person guilty. (5 RR 139-40). The record reflects counsel had not told Thomas exactly what the law required, nor asked him whether he would follow the law. (5 RR 138-40). *See Gardner v. State,* 306 S.W.3d 274, 295 (Tex. Crim. App. 2009) (holding to establish a proper basis for a challenge, the appellant must show the venireperson "understood the requirements of the law and could not overcome his prejudice well enough to follow the law"). Indeed, the exchanges highlighted by Appellant merely show that Thomas vacillated in his answers to the

prosecutor and defense counsel regarding the law of venue. *See id.* (holding when the record reflects that a prospective juror vacillated or equivocated on his ability to follow the law, the reviewing court must defer to the trial judge). Thus, resolving against Appellant this conflict in Thomas's testimony was reasonable and within the court's discretion. *See Threadgill*, 146 S.W.3d at 667. Thomas was qualified to sit on the jury, and this Court should overrule Issue One.

Issue 2: Casey Rackard

Appellant exercised his second peremptory challenge against venireperson Casey Rackard. (7 RR 80). At trial, Appellant urged the trial court to excuse Rackard because she (1) had already formed an opinion on his guilt from media coverage, and (2) would not hold the State to its burden of proving every element of the offense because she believed premeditated, planned murders or those involving children automatically warranted the death penalty. (7 RR 77-78). In response, the prosecutor argued Rackard said someone should pay for the crime—not that Appellant was guilty. (7 RR 79). The prosecutor further argued Rackard presumed Appellant's innocence when she said, "I don't know that he did it," and she would hold the State to its burden of proving otherwise. (7 RR 79). Indeed, the prosecutor noted that under article 35.16(a)(10) of the Code of Criminal Procedure, Appellant failed to prove Rackard had made a conclusion as to his guilt or innocence. (7 RR 79).

Additionally, Rackard repeatedly indicated her willingness to keep an open mind and listen to the evidence. (7 RR 79-80).

On appeal, Appellant contends the trial court erred in not excusing Rackard because she had determined his guilt, would not hold the State to its burden of proving every element, and would automatically answer the special issues to assess death.[10] (Appellant's Br. at 43-47). The record reflects otherwise.

Media Exposure/Appellant's Guilt

Appellant contends that based on Rackard's exposure to the case and immediate discussion of punishment, she had already found him guilty. (Appellant's Br. at 44-45). While apparently acknowledging that Rackard's testimony shows she would follow the law regarding guilt or innocence, Appellant contends the prosecutor forced her to say she would follow the law, and her answers did not reflect her true opinions. (Appellant's Br. at 45). The record reflects otherwise.

Rackard never demonstrated a belief that Appellant was already guilty. Her questionnaire shows she had only a general knowledge of the case's facts, and had not predetermined Appellant's guilt. (Rackard Questionnaire at 17). She simply testified that based on media coverage, she hoped the person who killed the victim would be

[10] In his brief, Appellant also makes passing references to Rackard's questionnaire answers related to consideration of his background as mitigation and inability to concentrate as a juror because of her young children. (Appellant's Br. at 46-47). There is no accompanying argument, nor were these answers raised at trial as bases for challenging Rackard. (Appellant's Br. at 43-47; 7 RR 77). If Appellant intended to present additional grounds for excusing Rackard through these references, they are inadequately briefed and the State will not address them.

found guilty—not that Appellant was the perpetrator. (7 RR 69, 72). Moreover, she unequivocally testified on numerous occasions that she would presume Appellant was not guilty, and if the State failed to prove every element of the offense beyond a reasonable doubt, she would find him not guilty. (7 RR 28-31, 73).

Rackard clarified the reason why she immediately discussed punishment options with defense counsel and not Appellant's guilt. She explained that because Appellant was "currently not guilty," and if the jurors found him not guilty, the punishment issue "is all a moot point and I don't have to discuss his life and not his life." (7 RR 71-73). Thus, Rackard did not harbor a predisposed opinion as to Appellant's guilt or a bias against him. The court properly denied the challenge against her on this basis.

Death Prone & State's Punishment Burden

Appellant contends that various answers in Rackard's questionnaire and her testimony show she would automatically assess a death sentence after a guilty verdict. (Appellant's Br. at 45-46). The record reflects otherwise.

Rackard's questionnaire reflects she believed the death penalty is appropriate in some cases, but not all. (Rackard Questionnaire at 1-2, 4). She did not hold an "eye for an eye" belief. (Rackard Questionnaire at 3). Rackard testified that no two cases are the same, and the circumstances dictate the penalty. (7 RR 15-17). She believed only an "extreme enough situation" would warrant the death penalty. (7 RR 65).

Rackard's questionnaire and testimony indicated examples of types of cases she believed *warranted* the death penalty, including those involving children or a planned murder. (7 RR 16-19, 64-65; Rackard Questionnaire at 3-4). She did not say such cases automatically deserved a death sentence, only the opportunity for one. (7 RR 64-65). Rackard promised both sides she would remove her emotion from the case, follow the law, and listen to both sides. (7 RR 31-33, 62-64). She unequivocally stated on numerous occasions that she would wait to consider the evidence presented during the punishment phase before weighing it and assessing a sentence. (7 RR 32, 63-64).

Rackard understood the law presumes a sentence of life in prison, and she would initially answer special issue number one "no" until she heard evidence to change that presumption. (7 RR 33-37). Rackard would not automatically vote "yes," even if she found the defendant guilty of capital murder. (7 RR 36-38). Rackard answered the same way when posed similar questions by defense counsel. (7 RR 58-59).

Not once did Rackard waver or give a conflicting answer regarding her belief that the facts of each case dictate the penalty. Rackard would hold the State to its burden of proving future dangerousness and never stated she would render an automatic answer to special issue number one. She repeatedly assured both sides she would listen to all the evidence with an open mind. Rackard did not hold a bias against the law of special issue number one, and the court properly denied the

challenge. Rackard was qualified to sit on the jury, and this Court should overrule Issue Two.

Issue 3: Gregory Kays

Appellant exercised his third peremptory strike against Gregory Kays. (7 RR 151-52). At trial, Appellant challenged Kays because he would not hold the State to its burden of proving multiple future violent acts in special issue number one. (7 RR 151). On appeal, Appellant argues the trial court abused its discretion in denying his challenge. (Appellant's Br. at 48).[11] The record justifies the court's ruling.

Kays made numerous unequivocal assurances to both sides that he would listen to the facts and evidence, and keep an open mind. (7 RR 112, 115, 129). He confirmed that special issue number one requires the State to prove multiple future criminal acts of violence. (7 RR 99-103). Kays would hold the State to its burden of proving the answer should be "yes" because, as he proclaimed, "[t]hat's the law." (7 RR 104). Kays agreed the answer to special issue number one could be "no," and he would not automatically answer it affirmatively. (7 RR 115).

Kays appeared conflicted and confused while responding to defense counsel's questions about special issue number one and future criminal acts of violence. Indeed,

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[11] In his brief, Appellant also makes passing references to Kays's questionnaire answers and testimony related to background as mitigation, his "eye for an eye" belief, requirement of remorse, and belief that police were more believable witnesses. (Appellant's Br. at 48-49). There is no accompanying argument, nor were these answers raised at trial as a basis for challenging Kays. (Appellant's Br. at 48-49; 7 RR 151). If these references were intended to present additional grounds for excusing Kays, they are inadequately briefed and the State will not address them.

the bulk of this questioning involved Kays asking counsel about the law's requirements—not his emphatic refusal to follow the law. (7 RR 134-42, 150). *See Gardner,* 306 S.W.3d at 295 (holding to establish a proper basis for a challenge, the appellant must show the venireperson "understood the requirements of the law and could not overcome his prejudice well enough to follow the law"). As defense counsel continued not to answer Kays's questions, Kays continued to ask counsel how the State could ever prove the answer to special issue number one should be "yes." (7 RR 137, 139-41, 146-48). Indeed, the exchanges highlighted by Appellant in his brief merely show that Kays equivocated in his understanding of the law, not that he would refuse to follow the law or hold the State to its burden. *See id.* (holding when the record reflects that a prospective juror vacillated or equivocated on his ability to follow the law, the reviewing court must defer to the trial judge). Thus, the trial court's resolving against Appellant this conflict in Kays's testimony was reasonable and entitled to deference. *See Threadgill*, 146 S.W.3d at 667. Kays was qualified to sit on the jury, and this Court should overrule Issue Three.

Issue 4: Michelle Queen

Appellant exercised his fourth peremptory strike on Michelle Queen. (8 RR 75). At trial, Appellant challenged Queen because she was a crime victim, believed murder with a gun warranted the death penalty, would credit the testimony of police officers over others, and was mitigation impaired. (8 RR 73-74).

On appeal, Appellant argues the trial court should have granted his challenge because Queen was the victim of an attempted-carjacking, which is similar to the offense charged here, and because she believed planned, intentional murders with guns warranted the death penalty. (Appellant's Br. at 51-53).[12] The record reflects otherwise.

Prior Attempted Carjacking Victim

The record does not support Appellant's contention that Queen harbored bias against him because she was the victim of an attempted carjacking. (Appellant's Br. at 52-53; Queen Questionnaire at 8). Queen unequivocally told both parties that while the perpetrator in her case was not prosecuted, the experience would not affect her if she served on Appellant's jury. (8 RR 15, 71). Queen told defense counsel that when she was 16 years old, a man approached a car she was in with a butter knife, but he gave up and ran away. (8 RR 71). No one was hurt, and the experience impressed on Queen "[n]ot to be a naïve 16 year old in a dark parking lot." (8 RR 71). The fact that Queen seemingly joked about being a naïve teenager shows the experience did not affect her to the extent that it caused her to harbor a bias against Appellant. Indeed, she reiterated she could set aside the experience if selected as a juror because her

[12] In his brief, Appellant also makes a passing reference to Queen's questionnaire answer related to a defendant's Fifth Amendment right to remain silent. (Appellant's Br. at 52). There is no accompanying argument, nor did Appellant raise this answer at trial as a basis for challenging Queen. (Appellant's Br. at 52; 8 RR 73-75). If this reference was intended to present an additional ground for excusing Queen, it is inadequately briefed and the State will not address it.

assailant had a butter knife and did not intend to hurt anyone. (8 RR 71). Thus, Queen evinced no bias against the law, and the court properly denied Appellant's challenge on this basis.

Death Prone

Appellant contends that based on Queen's "eye for an eye" belief as reflected in her questionnaire and testimony, she was biased in favor of the death penalty. (Appellant's Br. at 51-52). While Queen favored the death penalty, she believed it was appropriate in only some murder cases, but not all. (8 RR 15; Queen Questionnaire at 2-3). She unequivocally and repeatedly stated she believed planned and intentional murders are worthy of the death penalty, but not automatically deserving of it. (8 RR 17, 49-52).

Queen understood the law that a convicted capital murderer's default sentence is life without parole. (8 RR 58-60). She indicated such a sentence is "appropriate." (Queen Questionnaire at 2). Queen understood the jury must answer "no" to special issue number one unless the State meets its burden of proof. (8 RR 27-34, 40-41, 53, 63-65). Queen told defense counsel she could answer "no" to the first special issue because a convicted capital murderer is not automatically a future threat. (8 RR 61-62). Queen would listen to all the evidence before answering the special issue. (8 RR 34).

Queen assured both sides that she understood special issue number two. (8 RR 36-40, 65). She repeatedly and unequivocally stated she would consider all mitigating evidence, and if she heard sufficiently mitigating evidence, she could assess a life sentence. (8 RR 36-40, 65, 67-68). She indicated on her questionnaire that "circumstances and personality context" would be important to her in assessing punishment. (Queen Questionnaire at 4). She also disagreed that a person's background, life history, accomplishments, or good deeds should not be considered. (Queen Questionnaire at 5, 7). Her questionnaire answers, by implication, showed she would consider such circumstances. She would also consider mental-health testimony. (Queen Questionnaire at 11). Indeed, Queen testified she would keep an open mind in answering special issue number two. (8 RR 66-68).

Throughout her testimony, Queen unequivocally and repeatedly confirmed she would not automatically vote for death. Rather, she would wait and consider the evidence presented during the punishment phase to answer the special issues. Thus, contrary to Appellant's claims, Queen would follow the law and consider a life sentence. She was not biased against the law, and the court properly denied this challenge. Queen was qualified to sit on the jury, and this Court should overrule Issue Four.

Issue 5: Katrina Kohn

Appellant exercised his fifth peremptory challenge against Katrina Kohn. (10 RR 70). At trial, Appellant challenged Kohn because she would automatically answer "yes" to special issue number one based on the offense's facts and a defendant's history alone, and because she would require him to testify in violation of his Fifth Amendment rights. (10 RR 69-70).

On appeal, Appellant contends the trial court should have granted his challenge because Kohn would require him to testify and would automatically answer the first special issue to assess the death penalty since the prison system cannot control inmates. (Appellant's Br. at 54-55).[13] Kohn's testimony demonstrates otherwise.

Right Not to Testify

Appellant contends that based on Kohn's questionnaire answers and her testimony, she would require him to testify, which denied him his Fifth Amendment rights. (Appellant's Br. at 54-55). Kohn's testimony as a whole shows the opposite.

Kohn checked "agree" on her questionnaire that a defendant should testify. (Kohn Questionnaire at 6). However, her testimony provided context for her answer. She testified it is "fair" that jurors cannot consider a defendant's decision not to

[13] In his brief, Appellant also makes a passing reference to Kohn's questionnaire answer related to her personal beliefs about police officers. (Appellant's Br. at 55). There is no accompanying argument, nor did Appellant raise this answer at trial as a basis for challenging Kohn. (Appellant's Br. at 55; 10 RR 69). If, through this reference, Appellant intended to present an additional ground for excusing Kohn, it is inadequately briefed and the State will not address it.

testify. (10 RR 43). When the State asked Kohn if she could afford the defendant his Fifth Amendment right, she stated, "Absolutely. It's his right." (10 RR 43-44). Kohn explained her questionnaire response to defense counsel, stating that in her previous jury service, the defendant testified, and his testimony benefitted him. (10 RR 67). However, Kohn assured defense counsel she would not hold it against Appellant if he did not testify, although human nature made her want to hear a defendant speak and see his mannerisms. (10 RR 68).

Kohn gave one inconsistent response regarding a defendant's right not to testify. She was an equivocating juror in this minute respect. *See Gardner*, 306 S.W.3d at 295 (holding when the record reflects a prospective juror vacillated or equivocated on her ability to follow the law, the reviewing court must defer to the trial judge). Otherwise, Kohn assured both sides she would afford the defendant his Fifth Amendment right. Any vacillation in Kohn's testimony was for the trial court to resolve, and that determination is entitled to deference. *Threadgill*, 146 S.W.3d at 667.

Death Prone

Appellant asserts that Kohn could not fairly answer special issue number one because her questionnaire shows she disagreed that "[t]he State prison system in Texas can control inmates who have been convicted of violent offenses." (Appellant's Br. at 55; Kohn Questionnaire at 6). Likewise, Appellant contends Kohn would

automatically assess the death penalty if she found the defendant guilty of capital murder. (Appellant's Br. at 55). The record shows otherwise.

Kohn unequivocally and repeatedly confirmed that while the death penalty should be a sentencing option in some cases, it should be assessed only depending on the facts and circumstances of each case. (10 RR 15, 18, 26, 51, 54-56; Kohn Questionnaire at 2). Kohn assured both sides she would keep an open mind and not assess automatic answers. (10 RR 28, 35-36, 38, 45, 51, 57-58). Kohn understood that before the jury reaches the special issues, the presumption is that a person convicted of capital murder receives life without parole. (10 RR 60). She believed a life sentence would be appropriate. (Kohn Questionnaire at 2). Likewise, Kohn refused to hold an "eye for an eye" belief, explaining, "one bad deed does not warrant another." (Kohn Questionnaire at 3).

Despite Appellant's contentions, Kohn could fairly answer special issue number one. She testified she would follow the law and not automatically answer it "yes." (10 RR 43). She would hold the State to its burden of proving the first special issue should be answered "yes," because the law presumes the answer is "no." (10 RR 32, 42-43, 54, 58, 60). Kohn's explanations of the terms "probability," "criminal acts of violence," and "society" showed her understanding of the State's burden. (10 RR 32-35).

Indeed, Kohn stated that despite finding someone guilty of capital murder, she would not automatically deem that person a future danger. (10 RR 35-36, 45, 60-63). Likewise, she would not automatically find future dangerousness based on only the offense's facts, explaining, "there is a weighing that has to occur." (10 RR 62-64). Moreover, Kohn understood special issue number two, stating she was willing to listen to and weigh "any and all" mitigating evidence. (10 RR 40-41, 67). She believed a person's background, life history, accomplishments, or good deeds should be considered in assessing punishment. (Kohn Questionnaire at 5). Thus, Kohn evinced no bias against the law, and the court properly denied Appellant's challenge on this basis. Kohn was qualified to sit on the jury, and this Court should overrule Issue Five.

Issue 6: Catherine Wiley

Appellant exercised his sixth peremptory challenge against Catherine Wiley. (13 RR 86-87). At trial, Appellant challenged Wiley because she was an "economic killer" who would automatically assess the death penalty, she would not hold the State to its burden of proving multiple future acts of violence, and she was mitigation impaired. (13 RR 86-87).

On appeal, Appellant argues the trial court should have granted his challenge against Wiley because her "pro death penalty for economic reasons" opinion would lead her automatically to assess death without considering the special issues.

(Appellant's Br. at 57-61). Appellant further argues Wiley was mitigation impaired.[14] The record reflects otherwise.

Death Prone

Appellant contends various answers in Wiley's questionnaire show she would automatically assess a death sentence if she found someone guilty of capital murder. (Appellant's Br. at 59; Wiley Questionnaire at 2-3). While apparently acknowledging Wiley's testimony shows she would follow the law governing punishment assessment, Appellant contends the prosecutor indoctrinated her, and her answers did not reflect her true opinions. (Appellant's Br. at 58). Wiley's testimony shows the opposite.

Although Wiley strongly favored the death penalty, she unequivocally and repeatedly stated she could set aside her strong feelings, keep an open mind, and give full consideration to the evidence. (13 RR 13-14, 20, 35-36, 58-64). She did not believe in an "eye for an eye." (Wiley Questionnaire at 3). Wiley consistently told both sides that the death penalty is appropriate only in the right situation and in certain circumstances. (13 RR 13-14, 20, 61-64; Wiley Questionnaire at 1-2). Despite her questionnaire answers that she did not like paying taxes to keep a life-sentenced criminal alive, Wiley agreed that a sentence of life without parole is a fair, better

[14] In his brief, Appellant also makes passing references to Wiley's questionnaire answers and testimony that police were more believable witnesses. (Appellant's Br. at 60). There is no accompanying argument, nor were these answers raised at trial as a basis for challenging Wiley. (Appellant's Br. at 60; 13 RR 85). If these references were intended to present an additional ground for excusing Wiley, it is inadequately briefed and will not be addressed by the State.

punishment. (13 RR 18, 60-65; Wiley Questionnaire at 2). In fact, Wiley promised she would set aside her personal feelings about the economic aspect of the death penalty. (13 RR 63-64).

Wiley's answers reflected she understood the law surrounding special issue number one and would follow it. (13 RR 68-71). She would hold the State to its burden of proving the answer should be "yes" because the law presumes it is "no." (13 RR 26-27, 29-30, 35, 39-40). Wiley answered the same way when posed similar questions at length by defense counsel. (13 RR 68-70, 83). Wiley promised she would not render an automatic answer to special issue number one. (13 RR 35). She even told defense counsel that a prisoner will not always pose a threat to society. (13 RR 71-72). Not once did Wiley waver or give a conflicting answer on the matter. Thus, Wiley evinced no bias against the law, and the court properly denied this challenge.

Mitigation Bias

Appellant contends Wiley was biased against mitigation because in her questionnaire she opined that background, life history, good deeds, accomplishments, genetics, upbringing, and environment did not matter. (Appellant's Br. at 60-61; 13 RR 72-75; Wiley Questionnaire at 5, 7). While apparently acknowledging that Wiley's testimony shows she would follow the law as to consideration of mitigating evidence, Appellant contends the prosecutor indoctrinated her, and that her answers did not reflect her true opinions. (Appellant's Br. at 61). Wiley's testimony refutes

Appellant's claim. Indeed, she told defense counsel that her questionnaire answers at issue had changed, and she did believe such issues warranted consideration. (13 RR 74-76). Therefore, Wiley was not biased against mitigation.

Even if Wiley's questionnaire responses had not changed, she had no duty to consider any particular fact as mitigating. *Standefer v. State*, 59 S.W.3d 177, 181 (Tex. Crim. App. 2001). She was only obligated to consider all the evidence presented at trial in determining her answer to special issue number two. She unequivocally stated she would do so, and she repeatedly stated she would keep an open mind and consider any mitigating evidence presented. (13 RR 36-39, 43-46, 72-75). *See Coleman v. State*, 881 S.W.2d 344, 352 (Tex. Crim. App. 1994) (holding that the trial court did not err in denying a challenge for cause for an inability to consider mitigating evidence where the record showed that the prospective juror could listen to the evidence with an open mind). Wiley even indicated on her questionnaire that mental-health evidence would be "helpful" and a "great idea." (Wiley Questionnaire at 11). Likewise, her testimonial answers indicated an understanding of special issue number two and, in actuality, a willingness to answer "yes" if she heard sufficiently mitigating evidence. (13 RR 45, 66-68, 72, 77). Additionally, as a hypothetical governor, she would consider a reprieve for a convicted capital murderer if the person had changed while incarcerated. (13 RR 66-68). Thus, Wiley held no bias against the law, and the court

properly denied this challenge. Wiley was qualified to sit on the jury, and this Court should overrule Issue Six.

Issue 7: Juan Tijerina

Appellant exercised his seventh peremptory challenge against Juan Tijerina. (14 RR 78-79). At trial, Appellant challenged Tijerina because he would not hold the State to its burden of proving each element beyond a reasonable doubt, specifically, the charged manner and means of capital murder. (14 RR 78). On appeal, Appellant argues the trial court abused its discretion in denying his challenge. (Appellant's Br. at 62-63). Tijerina's testimony reflects otherwise.

Defense counsel posed a hypothetical to Tijerina in which the State had proven all the elements, except the death occurred by a knife, not a gun as alleged in the indictment. (14 RR 59). Placed in context, Tijerina did not say he would refuse to hold the State to its burden of proving the manner and means as alleged. (14 RR 59-61). Rather, Tijerina stated, "[T]hat's a slippery slope, to say the least. It's just the way the law says that, you know, I guess it wouldn't – according to the law, it wouldn't meet the capital murder type scenario." (14 RR 60). Tijerina further explained:

> [TIJERINA]: Yeah. My personal thoughts are that I wish the prosecution would probably have done a better job because, obviously, they've proven that this person killed somebody, and do their full duty. It's – my other personal thought is that's a legal tactic to get people out of – to blame for what they've done and what they are going to get for what they deserve. But I guess the way – I don't guess, I know the way the law is written, if that's what they want us to do here, then that's what we'll do. Does it make it right? In my opinion, no.

[DEFENSE COUNSEL]: I think what you're saying is you would still go along and follow the law in that situation; is that correct?

[TIJERINA]: Yeah, I follow the law. I try to follow all the laws. Do we agree with them all? Like I said in the beginning, no, I do not.

(14 RR 60-61).

Appellant has taken issue with a small piece of Tijerina's testimony, without any context. (Appellant's Br. at 63). Tijerina's testimony as a whole shows he consistently stated he would follow the law, even if he believed it was not right or he did not agree with it. (14 RR 60-61). The law does not require that jurors like the law—only that they will follow it. Tijerina would do so. Indeed, he made repeated, unequivocal statements that he would find the defendant innocent if the State failed to prove its case beyond a reasonable doubt, including the manner-and-means element. (14 RR 27-28, 42). Tijerina's clear and unwavering responses show he held no bias against the law, and the court properly denied Appellant's challenge. Tijerina was qualified to sit on the jury, and this Court should overrule Issue Seven.

Issue 8: Monte Rose

Appellant exercised his eighth peremptory challenge against Monte Rose. (16 RR 152-53). At trial, Appellant challenged Rose because he would automatically answer "no" to special issue number two. (16 RR 152).

On appeal, Appellant contends the trial court should have granted his challenge against Rose because he would refuse to consider mitigating evidence or special issue

number two itself. (Appellant's Br. at 64-67). Appellant further argues Rose would automatically assess the death penalty for a convicted capital murderer because of his strong faith and belief in the death penalty. (Appellant's Br. at 64, 67).

Appellant did not preserve for appellate review his contentions that Rose would automatically assess the death penalty based on his faith and beliefs, because Appellant did not raise this argument in the trial court. *See* Tex. R. App. P. 33.1(a). Thus, the State will focus only on the reason asserted at trial as the basis for Appellant's challenge. The record as a whole does not support Appellant's contention.

In support of his claim that Rose would not consider mitigating evidence, Appellant cites Rose's testimony and refers to his questionnaire, in which he disagreed that accomplishments, good deeds, genetics, circumstances of birth, upbringing, and environment should be considered when determining punishment. (Appellant's Br. at 64-66). The face of Rose's questionnaire refutes this contention. Rose disagreed that a person's background or life history do not matter in assessing punishment. (Rose Questionnaire at 5). He somewhat agreed that a convicted capital murderer's accomplishments or good deeds should not matter. (Rose Questionnaire at 5).

Nonetheless, Rose had no duty to consider any particular fact as mitigating. *Standefer*, 59 S.W.3d at 181. He was only obligated to consider all the evidence presented at trial in determining his answer to special issue number two. His testimony reflects that he could fulfill that duty. Indeed, Rose unequivocally stated he

would keep an open mind and consider any mitigating evidence presented. (16 RR 124-25, 129, 137-40). *See Coleman*, 881 S.W.2d at 352. His testimony revealed his understanding of special issue number two and, in fact, confirmations to both sides that he would not automatically answer "no" to the issue. (16 RR 122-25, 129, 143-47, 151-52). In fact, Rose indicated on his questionnaire that a person's punishment "should be based on the evidence" and "circumstances." (Rose Questionnaire at 4, 7). He would have "no problem" listening to mental-health evidence. (Rose Questionnaire at 11).

Moreover, Rose made numerous unwavering statements to both sides about his ability to follow the law. He specifically stated the death penalty is not appropriate in every case, and the special issues do not allow automatic answers. (16 RR 108-09, 115, 125, 129, 133-35, 140, 142-43). Rose stated his strong Christian faith prepared him to "have sound and good judgment"—not that his faith would cause him to refuse to consider mitigating evidence. (16 RR 126, 136-37, 149-50). The trial court properly concluded Rose was not challengeable as "mitigation impaired." Rose was qualified to sit on the jury, and this Court should overrule Issue Eight.

Issue 9: Catherine Parker

Appellant exercised his ninth peremptory challenge against Catherine Parker. (17 RR 143-44). At trial, Appellant challenged Parker because she was mitigation

impaired; specifically, she would not listen to evidence from mental-health experts or about his background. (17 RR 143).

On appeal, Appellant contends the trial court erred in denying his challenge because Parker: (1) strongly favored the death penalty; (2) believed people should be held accountable for their actions; (3) said the death penalty was appropriate regardless of a lack of criminal history; (4) would not fairly consider mitigation evidence; and (5) held a bias toward law enforcement. (Appellant's Br. at 68-71).

Appellant did not preserve for appellate review his contentions that Parker strongly favored the death penalty, believed people should be held accountable, and harbored a bias toward police. He did not raise these arguments in the trial court. *See* Tex. R. App. P. 33.1(a). Thus, the State will focus only on the reasons asserted at trial as the basis for the challenge for cause.

Appellant contends Parker's questionnaire responses show she would not consider evidence of genetics, upbringing, environment, and mental health when answering the mitigation special issue. (Appellant's Br. at 69-70; Parker Questionnaire at 5, 7, 11). Parker's testimony as a whole refutes Appellant's claim. She told the State she had incorrectly answered those questions, and she did believe such mitigating factors warranted consideration. (17 RR 108-11). She similarly explained to defense counsel that in answering her questionnaire, she either had misread the questions or did not realize what the questions asked. (17 RR 118, 123).

Even if Parker's questionnaire responses had not changed, she had no duty to consider any particular fact as mitigating. *Standefer*, 59 S.W.3d at 181. She was only obligated to consider all the evidence presented at trial in determining her answer to special issue number two. Parker's testimony reflects she could fulfill that duty. She unequivocally asserted she would keep an open mind and consider any mitigating evidence presented. (17 RR 97-98, 101, 106-08, 110-13, 120-24). *See Coleman*, 881 S.W.2d at 352. In fact, Parker's testimony reflects she understood special issue number two and the law's prohibition on automatic answers. (17 RR 108). Moreover, Parker unequivocally told defense counsel that even after finding a defendant guilty of capital murder and answering "yes" to special issue number one, she could still assess life without parole. (17 RR 142). Parker's questionnaire shows she would consider the circumstances before assessing punishment. (Parker Questionnaire at 4). Parker held no bias against the law, and the court properly denied this challenge. Parker was qualified to sit on the jury, and this Court should overrule issue nine.

Issue 10: Casey Theis

Appellant exercised his tenth peremptory challenge against Casey Theis. (21 RR 88). At trial, Appellant challenged Theis because he was mitigation impaired on mental-health mitigation and his employment situation would conflict with the time required for jury service. (21 RR 87). On appeal, Appellant argues the trial court

abused its discretion in denying his challenge. (Appellant's Br. at 72-75).[15] The record supports the trial court's denial of Appellant's challenge.

Employment Concerns

Appellant contends that because Theis had recently left his employment, he was concerned that jury service might affect his ability to gain employment and begin earning an income. (Appellant's Br. at 73-74). Appellant cites numerous exchanges between Theis and both sides regarding his employment situation. (Appellant's Br. at 73-74). While Theis told both sides and the court that his employment concerned him, he made numerous assurances that if selected, he would be able to give fair and meaningful consideration to the evidence and pay attention to the proceedings. (21 RR 8, 11-13, 49, 52-55, 85-86). Theis told defense counsel he wanted to fulfill his civic duty of serving as a juror because defendants deserve jurors like him who are open-minded and take the system seriously. (21 RR 54). However, Theis also stated he could not set aside his financial concerns to focus on the case. (21 RR 55-56). Theis vacillated about his ability to set aside his employment-related concerns and serve on the jury. *See Gardner*, 306 S.W.3d at 295 (holding when the record reflects that a prospective juror vacillated or equivocated on his ability to follow the law, the

[15] In his brief, Appellant also makes a single passing reference to Theis's questionnaire answer that police were more believable witnesses. (Appellant's Br. 75). There is no accompanying argument, nor was this answer raised at trial as a basis for challenging Theis. (Appellant's Br. at 60; 21 RR 87). If this reference was intended to present an additional ground for excusing Theis, it is inadequately briefed and the State will not address it.

reviewing court must defer to the trial judge). Any vacillation in Theis's testimony was for the trial court to resolve, and that determination is entitled to deference. *See Threadgill*, 146 S.W.3d at 667.

Moreover, the personal financial issues of a venireperson like Theis are not specifically enumerated in the Code of Criminal Procedure as a ground for a challenge for cause. *See* Tex. Code Crim. Proc. Ann. art. 35.16; *see also Garcia v. State*, 887 S.W.2d 846, 859 (Tex. Crim. App. 1994) (en banc) (upholding the trial court's denial of a for-cause challenge where the juror expressed concern that his work situation would hinder his full attention at trial, but also stated he could be fair and impartial and any work distractions would not impair his ability to serve). The fact that Theis expressed concern over his work situation did not amount to a proper legal challenge against him, because he also said he would keep an open mind and wanted to fulfill his civic duty. *See Garcia,* 887 S.W.2d at 859. Accordingly, the trial court's resolving against Appellant the conflict in Theis's testimony was reasonable and entitled to deference. *See Threadgill*, 146 S.W.3d at 667.

Mitigation Bias

Appellant contends the trial court should have excused Theis because he would not "fairly consider any mitigation evidence the defense could present." (Appellant's Br. at 75). In support of this contention, Appellant refers to Theis's questionnaire, in which he indicated background, life and mental-health history, accomplishments,

good deeds, genetics, circumstances of birth, upbringing, and environment do not matter when determining punishment. (Appellant's Br. at 74-75; Theis Questionnaire at 5, 7). Theis's testimony refutes Appellant's claim. He told defense counsel that he answered the questionnaire without knowing the law, and he understood the law after learning it. (21 RR 68-72). The fact that Theis expressed an opinion on his questionnaire about particular, potentially mitigating circumstances, without knowing what the law required, did not automatically make him unfit to serve.

Indeed, Theis had no duty to consider any particular fact as mitigating. *Standefer*, 59 S.W.3d at 181. He was only obligated to consider all the evidence presented at trial in determining his answer to the special issue. He unequivocally stated he would do so, and he made numerous assurances that he would keep an open mind and consider any mitigating evidence presented, including mental-health expert testimony. (21 RR 42-44, 47-48, 65, 70-71, 83). *See Coleman*, 881 S.W.2d at 352. Indeed, Theis's answers indicated an understanding of special issue number two and a willingness to answer the issue "yes." (21 RR 40-43, 80-81). Finally, Theis made numerous unwavering statements that he would not render automatic answers on the two special issues. (21 RR 19-21, 25-26, 30, 39-40, 57-61). The trial court properly concluded Theis was not mitigation impaired. Theis was qualified to sit on the jury, and this Court should overrule Issue Ten.

Issue 11: Barbra Applebaum

Appellant exercised his twelfth peremptory challenge against Barbra Applebaum. (22 RR 146).[16] At trial, Appellant challenged Applebaum because she was mitigation impaired and would give police officers' testimony more credibility. (22 RR 146).

On appeal, Appellant contends the trial court should have granted his challenge against Applebaum because she believed a life sentence for a murderer was too lenient, she would give police officers more credibility than other witnesses, she would not meaningfully consider mitigating evidence, and she would require him to testify. (Appellant's Br. at 77-79).

Appellant did not preserve for appellate review his contentions that Applebaum believed life in prison was too lenient and would require him to testify, because he did not raise these arguments in the trial court. *See* Tex. R. App. P. 33.1(a). Thus, the State will focus only on the reasons asserted at trial as the basis for the challenge. The record as a whole refutes Appellant's contentions.

In general, Applebaum made numerous unambiguous statements that she is required to follow the law even if she disagreed with it. (22 RR 92-94, 123). She also

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[16] Appellant exercised his eleventh peremptory challenge against venireperson Domenique Delafuente-Hensen. (22 RR 78). He did not challenge Delafuente-Hensen for cause at trial. (22 RR 78).

unequivocally stated that, generally, she would listen to all the evidence with an open mind and make decisions based on the facts and the law. (22 RR 98-99, 126-28).

Police Officer Credibility

Appellant argues Applebaum would "automatically give greater weight to anything a police officer testified to and find him more believable than other witnesses, therefore making her an unqualified juror." (Appellant's Br. at 78). The record indicates otherwise.

The context of Applebaum's complained-of testimony refutes Appellant's contention, and her statements did not make her automatically challengeable for cause. She testified that she backed police officers to the extent they follow the law, because they have specialized knowledge by investigating the crime and collecting evidence. (22 RR 128-29). *See Laca v. State*, 893 S.W.2d 171, 183 (Tex. App.—El Paso 1995, pet. ref'd) (holding trial court properly denied for-cause challenge against venireperson who said he would believe police officers' testimony because of their training and ability to note details). Further, on both her questionnaire and during her testimony, Applebaum unequivocally stated she would treat police officers the same as any other testifying witness, and she would examine each witness's testimony in the same light. (22 RR 121; Applebaum Questionnaire at 5).

Moreover, regarding Applebaum's questionnaire answer that a person charged by the police with a crime is guilty, she unequivocally stated she would change her

response to "uncertain." (22 RR 128-29; Applebaum Questionnaire at 6). Indeed, Applebaum explained, she would not make such an assumption until after she heard the facts. (22 RR 128-29). Likewise, Applebaum would not assume someone was guilty simply because the police had arrested him. (22 RR 129-30). Any vacillation in Applebaum's testimony was for the trial court to resolve, and that determination is entitled to deference. *See Threadgill*, 146 S.W.3d at 667.

Mitigation Bias

Appellant contends the trial court should have excused Applebaum because she was mitigation impaired. (Appellant's Br. at 76). In support of this contention, Appellant refers to Applebaum's questionnaire, in which she disagreed that genetics, circumstances of birth, upbringing, and environment should be considered when determining punishment in a capital murder case. (Appellant's Br. at 78; Applebaum Questionnaire at 5). The record reflects otherwise. Indeed, Applebaum told defense counsel that she answered the questionnaire without knowing the law and, after learning the law, she would change her answers. (22 RR 140-43). That is, Applebaum would consider the above-referenced mitigating circumstances. (22 RR 140-43).

Even if Applebaum had not changed her questionnaire answers, she had no duty to consider any particular fact as mitigating. *Standefer*, 59 S.W.3d at 181. She was only obligated to consider all the evidence presented at trial in determining her answer to the special issue. She unequivocally stated she would do so, and she made

numerous assurances to both sides that she would keep an open mind and consider any mitigating evidence presented. (22 RR 115-18, 139-43). *See Coleman*, 881 S.W.2d at 352. She indicated on her questionnaire that she would want to "know the foundation of the criminal and the facts and circumstances." (Applebaum Questionnaire at 3). She believed mental-health testimony in a capital murder case would be a "[g]reat idea!" (Applebaum Questionnaire at 11). Her testimonial answers indicated an understanding of special issue number two and a willingness to answer it "yes." (22 RR 115). Finally, Applebaum made unwavering statements that she would not automatically answer "no" to special issue number two. (22 RR 139-40). Applebaum held no bias against the law governing mitigation, and the court properly overruled this challenge. Applebaum was qualified as a juror, and this Court should overrule Issue 11.

Issue 12: James Roman

Appellant exercised his thirteenth peremptory strike against James Roman. (23 RR 85). At trial, Appellant challenged Roman because he held an "eye for an eye" belief, and he would consider special issue number two while answering the first special issue. (23 RR 84-85). Appellant contended that once Roman answered "yes" to special issue number one, he would have already considered special issue number two and would automatically answer it "no." (23 RR 84-85).

On appeal, Appellant argues the trial court erred by denying his challenge for cause against Roman for four reasons. First, Appellant argues Roman's "eye for an eye" belief would lead him to automatically assess a death sentence after a guilty verdict. (Appellant's Br. at 80-81). Second, Appellant contends because Roman would automatically assess death, he would require the defense to prove "he was worthy of life" and not hold the State to its burden of proving future dangerousness. (Appellant's Br. at 82). Third, Appellant argues Roman was mitigation impaired because he would consider the two special issues together. (Appellant's Br. at 82-83). Finally, Appellant avers Roman would require remorse to assess a life sentence. (Appellant's Br. at 83).

Appellant did not preserve for appellate review his contention that Roman would require him to show remorse, because did not raise this argument in the trial court. *See* Tex. R. App. P. 33.1(a). Thus, the State will focus only on the reasons asserted at trial as the basis for the challenge for cause. The record supports the trial court's denial of Appellant's challenge.

Death Prone

Appellant contends that because Roman held an "eye for an eye" belief, he would automatically assess a death sentence if he found Appellant guilty of capital murder. (Appellant's Br. at 80-83). The record as a whole refutes Appellant's contention. Roman indicated on his questionnaire that the death penalty is

appropriate in some murder cases, but not all. (Roman Questionnaire at 2). While Roman stated the death penalty is an appropriate punishment for planned, premeditated capital murders, he also identified life without parole as an appropriate punishment because it takes away a person's freedoms. (23 RR 20-21, 58-59; Roman Questionnaire at 2). Roman acknowledged his "eye for an eye" belief to defense counsel, but he clearly understood the law does not allow jurors to automatically assess a death sentence without considering all the circumstances. (23 RR 63-66; Roman Questionnaire at 3). Indeed, Roman told defense counsel he would consider both special issues in making a punishment determination. (23 RR 72). Roman agreed with the prosecutor that a separate punishment phase seemed fair when considering the ultimate punishment. (23 RR 37). Roman was not biased against the law, and the court properly concluded he was not challengeable as "death prone."

Special Issue Number One

Appellant contends that because Roman would automatically assess a death sentence after the guilt phase, he would require the defense to prove "he was worthy of life." (Appellant's Br. at 81-82). The record indicates otherwise. Indeed, Roman understood the default sentence is life without parole. (23 RR 65-66). He unequivocally told both sides he would follow the law and hold the State to its burden of proving the defendant would be a future danger. (23 RR 39-41, 72-74). Roman's responses to both sides' explanations of special issue number one show he

understood the law. (23 RR 38-42, 72-74). Finally, Roman promised defense counsel he would not automatically answer "yes" to the first special issue. (23 RR 75). The court properly concluded that Roman was not biased against the law in this respect.

Special Issue Number Two

Appellant contends Roman should have been excused because he was mitigation impaired. (Appellant's Br. at 82). In support, Appellant refers to Roman's testimony that he would consider the two special issues together. (Appellant's Br. at 82-83). However, Appellant also acknowledges Roman's testimony showing he would follow the law and separately consider special issue number two. (Appellant's Br. at 82-83).

The record shows that Roman vacillated in his understanding of special issue number two and the requirement that jurors consider it separately from the first special issue. *See Gardner*, 306 S.W.3d at 295 (holding when the record reflects that a prospective juror vacillated or equivocated on his ability to follow the law, the reviewing court must defer to the trial judge). Roman indicated to the prosecutor and initially to defense counsel that he would consider special issue number one before special issue number two and reiterated he would "back up" between the two issues to reconsider the evidence. (23 RR 43-45, 71-72, 75-76). If Roman believed something was sufficiently mitigating after he reexamined the evidence, he would answer "yes" to special issue number two and assess a life sentence. (23 RR 47-48, 71, 75-76). He said

he was not a person who could never find something sufficiently mitigating. (23 RR 48-49).

The excerpts Appellant cites in his brief show only that Roman was confused by and misunderstood defense counsel's questions and the law. The record shows that during later voir dire by the defense, Roman seemed to believe that jurors would consider both special issues together, i.e., mitigating factors would weigh into the future-dangerousness determination. (23 RR 75-79). The entirety of his answers, however, reflect his eventual understanding of the law and his willingness to follow it.

Indeed, after defense counsel informed Roman of the law that jurors "answer one at a time," Roman responded, "You answer one at a time?" (23 RR 79). Counsel reiterated that jurors answer special issue number one first. (23 RR 79). While Roman stated the defendant's future dangerousness would likely factor into his answer to the second special issue, he refused to say he would answer the mitigation special issue before answering the first. (23 RR 79). Instead, Roman stated the two issues fit together "to a certain extent," but the jurors still "have to address them one at a time." (23 RR 79). After learning the law, Roman confirmed he could "definitely" answer special issue number one first, reset and step back, and then examine everything again. (23 RR 79-80). Roman apologized to defense counsel if his answers had been confusing, explaining he was trying to "keep up" with counsel's questions.

(23 RR 79-80). Roman assured counsel, "I can answer No. 1 and then step back and answer No. 2." (23 RR 80).

Roman's questioning as a whole shows he equivocated in his understanding of the law, not that he would consider special issue number two before answering number one. *See Gardner,* 306 S.W.3d at 295 (holding to establish a proper basis for a challenge, the appellant must show the venireperson "understood the requirements of the law and could not overcome his prejudice well enough to follow the law").

Moreover, Roman repeatedly assured defense counsel he would keep an open mind and consider mitigating evidence, including factors like mercy and a person's family background and life history. (23 RR 77, 82-83). His questionnaire indicates his willingness to consider a wide array of mitigating circumstances. (Roman Questionnaire at 5, 7, 11). Roman's consideration of mitigating evidence separate and apart from special issue number one means he would not automatically assess a death sentence. The record shows that after Roman learned the law governing the two special issues, he was not biased against it. Any vacillation in his answers was for the trial court to resolve, and that determination is entitled to deference. *Threadgill*, 146 S.W.3d at 667. This Court should overrule Issue 12.

Issue 13: Sandra Johnston[17]

Appellant exercised his fourteenth peremptory strike against Sandra Johnston. (24 RR 163-64). At trial, Appellant challenged Johnston because she would give a police officer's testimony greater credibility, which made her biased against the defense. (24 RR 163). On appeal, Appellant argues the trial court abused its discretion in denying his challenge. (Appellant's Br. at 84). The record indicates otherwise.

The entirety of Johnston's complained-of testimony refutes Appellant's contention, and her statements did not make her challengeable for cause. Johnston's questionnaire indicated she considered police officers more believable than most witnesses. (Johnston Questionnaire at 5). She explained her answer:

> [JOHNSTON]: Yes, I put down I would give police a little more weight simply because they're trained responders. They are – in these situations, they are more likely to know exactly what's going on, whereas if you have just been thrown into some crisis, people – and it's a one-time thing for you, a police officer's observations are going to be more believable than yours.
>
> [THE PROSECUTOR]: Okay.
>
> [JOHNSTON]: More along that line. Not whether they're truthful or not but that they have a better understanding.

(24 RR 142).

Johnston further explained to defense counsel that she would be more inclined to believe a police officer's observation of an event "because they're trained to

[17] The index of the Reporter's Record references this venireperson as Sandra Johnson. (1 RR 27).

observe these things." (24 RR 160, 162). Her belief stemmed from her military experience that made her a "trained observer … to look at what's happening," and police officers are the same way. (24 RR 161-62). Johnston qualified that she would only give police officers more credibility regarding their personal observations; otherwise, she would credit the opinion testimony of all witnesses the same. (24 RR 162). Moreover, after both sides discussed with Johnston the law of witness credibility, she unequivocally assured both sides she would be able to follow the law. (24 RR 140-41, 160). Indeed, Johnston clearly stated she would initially examine the credibility of each witness's testimony the same, regardless of their occupation. (24 RR 141).

Johnston unequivocally told both sides that she answered her questionnaire the way she did not because police officers are more truthful, but because they are better trained at responding to crime scenes as compared with lay witnesses. *See Laca*, 893 S.W.2d at 183 (holding trial court properly denied for-cause challenge against venireperson who said he would believe police officers' testimony because of their training and ability to note details). Johnston did not testify that police officers are entitled to automatic credibility, nor did she assert that a police officer would never lie. She confirmed she would wait and listen to each witness's testimony before determining his or her credibility. Thus, Johnston held no bias against the law

governing police officer testimony, and the court properly overruled this challenge. *See id.* Johnston was qualified to sit on the jury, and this Court should overrule Issue 13.

Issue 14: Stacy Summers

Appellant exercised his fifteenth peremptory strike against Stacy Summers. (25 RR 80-81). At trial, Appellant challenged Summers because she would automatically assess the death penalty after convicting a capital murderer and also after finding him a future danger. (25 RR 80). Therefore, Appellant argued Summers would never reach special issue number two or consider mitigation. (25 RR 80).

On appeal, Appellant complains the trial court should have excused Summers because she (1) harbored a bias toward law enforcement; (2) was acquainted with the family of another Dallas County murder victim; (3) had a friend who was a rape victim; and (4) would automatically assess the death penalty based on horrific facts like in Karla Faye Tucker's case, which also made her mitigation impaired. (Appellant's Br. at 86-88).[18] The record reflects otherwise.

Appellant did not preserve for appellate review his contentions that Summers held a bias in favor of law enforcement, was acquainted with the family of another murder victim, and had a friend who was a rape victim. He did not raise these

[18] In his brief, Appellant also makes a passing reference to Summers's questionnaire answer that she was "uncertain" if a person charged with a crime was probably guilty. (Appellant's Br. 87). There is no accompanying argument, nor was this answer raised at trial as a basis for challenging Summers. (Appellant's Br. at 87; 25 RR 80). If this reference was intended to present an additional ground for excusing Summers, it is inadequately briefed and the State will not address it.

arguments in the trial court. *See* Tex. R. App. P. 33.1(a). Thus, the State will focus only on the reasons asserted at trial as the basis for the challenge for cause. His issue should fail.

Death Prone

Appellant contends Summers would automatically impose a death sentence on a convicted capital murderer. (Appellant's Br. at 86-87). The record indicates otherwise. Indeed, Appellant acknowledges Summers's testimony that she would follow the law and consider special issues number one and two. (Appellant's Br. at 87).

Summers unequivocally indicated that the death penalty is a fair punishment in "some circumstances" based on the facts, not that she would automatically or always assess it. (25 RR 16-17, 20-21; Summers Questionnaire at 1-2). She did not believe in an "eye for an eye," stating life is "more complex." (Summers Questionnaire at 3). While Summers stated she would want a murderer like Karla Faye Tucker to die, she did not know the facts of Appellant's case, and he was "just … anybody" to her. (25 RR 26-27, 71-72). Summers affirmed that if she found a defendant guilty of capital murder, she would be open to listening to all the evidence and would then answer the two special issues. (25 RR 29; Summers Questionnaire at 4). She firmly stated she would not render automatic answers on the two issues. (25 RR 30-35, 41-42).

Likewise, Summers would only *consider* the death penalty for someone she deemed a future danger, not automatically assess it. (25 RR 67-70).

Indeed, Summers understood that the law presumes the default sentence for capital murder is life without parole. (25 RR 60-61). She indicated life in prison would be an appropriate punishment. (Summers Questionnaire at 2). She unequivocally stated she would hold the State to its burden of proving special issue number one should be answered "yes." (25 RR 67-70). Summers specifically told defense counsel that a convicted capital murderer's punishment "requires consideration," thought, and an examination of all the information. (25 RR 54-55, 62, 67). Finally, she repeatedly told both sides that she had a lot of compassion for people and could be fair. (25 RR 42, 73, 78). Summers's testimony showed she would consider the evidence before assessing punishment. Thus, she was not death prone, and the court properly denied this challenge.

Mitigation Bias

Appellant contends Summers was "either confused about Special Issue No. 2 or she is 'mitigation impaired.'" (Appellant's Br. at 88). He specifically complains she would not consider a person's background and genetics, and she questioned certain mitigating circumstances. (Appellant's Br. at 87; 25 RR 75-77; Summers Questionnaire at 5, 7).

Summers had no duty to consider any particular fact as mitigating. *Standefer*, 59 S.W.3d at 181. She was only obligated to consider all the evidence presented at trial in determining her answer to special issue number two. She unequivocally stated she would do so, and she specifically stated she would keep an open mind and give meaningful consideration to any mitigating evidence presented. (25 RR 39-41, 74-79). *See Coleman*, 881 S.W.2d at 352. She favorably viewed mental-health evidence. (Summers Questionnaire at 11). The fact that Summers might not regard certain factors to be mitigating did not render her challengeable.

Moreover, Summers's answers showed she understood special issue number two and would answer it "yes" if she heard sufficiently mitigating evidence. (25 RR 45, 66-68, 72, 76-77). Likewise, she unequivocally told both sides she would not automatically answer "no" to special issue number two. (25 RR 38, 72-75). Summers promptly dismissed defense counsel's attempt to coax her into saying she would automatically assess death after finding the defendant to be a future danger. (25 RR 72-73). Summers uniformly told both sides that she liked the law requiring jurors to step back and examine all the evidence again to answer special issue number two. (25 RR 37-38, 54-55). Summers held no bias against the law, and the trial court properly denied this challenge. Summers was qualified to serve, and this Court should overrule Issue 14.

Issue 15: Donna Foster

Appellant requested and received an additional, sixteenth peremptory strike, which he exercised on Donna Foster. (27 RR 73-74). At trial, Appellant challenged Foster because she would automatically assess the death penalty following a guilty verdict and after deeming a remorseless defendant a future danger, which made her mitigation impaired. (27 RR 73).

On appeal, Appellant contends the trial court should have excused Foster because she would require him to show remorse to assess a life sentence, which denied him his right to remain silent under the Fifth Amendment. (Appellant's Br. at 89-91). Appellant also argues Foster was mitigation impaired and would automatically assess a death sentence for remorseless killers, child-killers, and rapist-killers without regard for the special issues. (Appellant's Br. at 92–93).[19]

Appellant did not preserve for appellate review his contention that Foster's requirement of remorse denied him his Fifth Amendment right to remain silent, because he did not raise this argument in the trial court. *See* Tex. R. App. P. 33.1(a). Thus, the State will focus only on the reasons asserted at trial as the basis for the challenge for cause. The record supports the trial court's ruling.

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[19] In his brief, Appellant also makes a passing reference to Foster's questionnaire answer that police were more believable witnesses. (Appellant's Br. at 92). There is no accompanying argument, nor was this answer raised at trial as a basis for challenging Foster. (Appellant's Br. at 92; 27 RR 72). If this reference was intended to present an additional ground for excusing Foster, it is inadequately briefed and will not be addressed by the State.

Automatic Death Penalty/Lack of Remorse

Appellant contends Foster would automatically assess the death penalty on a remorseless killer, a child-killer, or a rapist-killer. (Appellant's Br. at 90-93). The record indicates otherwise. Foster made numerous unequivocal statements that she could follow the law and not automatically assess a death sentence. (27 RR 27-29, 32-33, 35-37). She did not hold an "eye for an eye" belief. (Foster Questionnaire at 3). Although Foster strongly favored the death penalty, she thought it was appropriate in only some murder cases, not all. (27 RR 13-16, 48-51, 60-61; Foster Questionnaire at 2-3). She clarified that a convicted capital murderer would be "deserving of the death penalty," but she would not automatically assess a death sentence solely based on a guilty verdict. (27 RR 15-16, 27-29, 32-33, 35-37, 50, 58-59, 64). *See Gardner*, 306 S.W.3d at 295 (holding that when the record reflects a prospective juror vacillated or equivocated on her ability to follow the law, the reviewing court must defer to the trial judge). Indeed, Foster understood that the default sentence is life without parole. (27 RR 23).

Foster repeatedly stated she would keep an open mind and wait to hear all the evidence before answering the special issues. (27 RR 27-29, 32, 36-38, 40). In fact, Foster assured both sides she would hold the State to its burden of proving the answer to the first special issue should be "yes." (27 RR 29, 32, 57-58). The whole of

Foster's testimony shows she did not hold a bias against the law, and the court properly denied this challenge.

Mitigation Bias

Appellant contends that based on Foster's questionnaire answers and testimony, she would not give meaningful consideration to "genetics, circumstances of birth, etc.," accomplishments, and good deeds. (Appellant's Br. at 92; Foster Questionnaire at 5, 7). Foster told defense counsel she would change her questionnaire response to indicate she would consider a person's accomplishments or good deeds, explaining she had been "in a rush" to answer that question. (27 RR 68).

Even if Foster had not changed her answer, she had no duty to consider any particular fact as mitigating. *Standefer*, 59 S.W.3d at 181. She was only obligated to consider all the evidence presented at trial in answering special issue number two. She unequivocally stated she would do so, and she specifically stated she would keep an open mind and give meaningful consideration to any mitigating evidence presented. (27 RR 37-40, 70-71). *See Coleman*, 881 S.W.2d at 352. Indeed, she told both sides she would consider "everything," and that she could assess a life sentence if she heard sufficiently mitigating evidence like character and upbringing. (27 RR 37-38, 59-60, 64). She even indicated that a person's background or life history should be considered, and she would listen to mental-health testimony. (Foster Questionnaire at

5, 7, 11). Accordingly, the court properly denied this challenge. Foster was qualified to sit on the jury, and this Court should overrule Issue 15.

Issue 16: Kelly Stejskal

Appellant requested and received one additional, seventeenth peremptory strike, which he exercised on Kelly Stejskal. (29 RR 67-68). At trial, Appellant challenged Stejskal because her personal views would lead her to automatically assess the death penalty after a guilty verdict, and she was mitigation impaired. (29 RR 66-67). On appeal, Appellant argues the trial court abused its discretion in denying his challenge. (Appellant's Br. at 95-97).[20] The record supports the court's ruling.

Death Prone

Appellant contends Stejskal would automatically assess the death penalty after finding a defendant guilty of capital murder because she held pro-death-penalty opinions and believed in an "eye for an eye." (Appellant's Br. at 95-96). The record refutes Appellant's claim.

Although Stejskal favored the death penalty and indicated someone who committed a bad crime "needs to go," she did not say she would automatically assess the death penalty in all capital murder cases. (29 RR 14). In fact, she made numerous

[20] In his brief, Appellant also makes passing references to Stejskal's questionnaire answers related to the police charging someone and a defendant testifying. (Appellant's Br. at 96). There is no accompanying argument, nor were these answers raised at trial as bases for challenging Stejskal. (Appellant's Br. at 96; 29 RR 66-68). If these references were intended to present additional grounds for excusing Stejskal, they are inadequately briefed and the State will not address them.

unequivocal statements that only some capital murderers deserve the death penalty, not all. (29 RR 15, 48-49, 50-53; Stejskal Questionnaire at 2). Indeed, as to whether she held an "eye for an eye" belief, Stejskal wrote on her questionnaire, "yes & no depending on the circumstances." (Stejskal Questionnaire at 3). Depending on the offense's facts, Stejskal believed that life in prison would be an "appropriate" punishment. (29 RR 26-27, 53-54, 57; Stejskal Questionnaire at 2). Likewise, she opined the death penalty is a severe punishment. (29 RR 55, 57).

Stejskal made numerous unequivocal assurances that she could follow the law, keep an open mind, and wait until she heard the evidence to decide her special-issue answers. (29 RR 11, 26-27, 46-47, 59). In other words, she would not assess automatic answers. Stejskal believed Texas's two-question punishment phase was fair. (29 RR 26). In fact, Stejskal assured both sides on several occasions that she would hold the State to its burden of proving the answer to the first special issue should be "yes." (29 RR 28-29, 32-33, 57-58). She understood special issue number one and that the presumed answer is "no" unless the State meets its burden. (29 RR 28-32, 59-62). Despite finding a person guilty of capital murder, Stejskal would not automatically answer "yes" to special issue number one. (29 RR 33, 59-62).

Stejskal understood that after answering "yes" to special issue number one, a defendant's punishment is not yet decided because jurors must then consider special issue number two. (29 RR 34-36). Stejskal assured defense counsel she would not

answer special issue number two without hearing evidence about the person. (29 RR 62-63). Stejskal's repeated promises to follow the law show she was not death prone. To the extent Stejskal made any statements that reflected otherwise, the conflict was for the court to resolve, and it resolved it against Appellant. The court's determination was proper and entitled to deference. *See Threadgill*, 146 S.W.3d at 667.

Mitigation Impaired

Appellant contends that based on Stejskal's questionnaire answers and testimony, she would not give meaningful consideration to accomplishments, good deeds, background, or life history in assessing punishment. (Appellant's Br. at 96-97). The face of Stejskal's questionnaire refutes Appellant's claim. She checked "somewhat disagree" that a person's background, life history, accomplishments, or good deeds should not matter—not that she agreed those attributes do not matter. (Stejskal Questionnaire at 5). She also indicated in determining punishment, genetics, circumstances of birth, upbringing, and environment should "maybe" be considered "depending on the crime." (Stejskal Questionnaire at 7). She would also consider mental-health evidence. (Stejskal Questionnaire at 11). Stejskal's testimonial explanation of her responses also refutes Appellant's contentions. Stejskal told the prosecutor she did not know the law when she answered her questionnaire. (29 RR 41-42). She explained to defense counsel she wrote her answers without any context, specifically stating, "I would have to know the specifics, the facts to be able to

determine whether or not [the factors] would influence me at all." (29 RR 64). She further explained the questions were difficult to answer "without knowing everything." (29 RR 65).

Even without her explanation of her questionnaire answers, Stejskal had no duty to consider any particular fact as mitigating. *Standefer*, 59 S.W.3d at 181. She was only obligated to consider all the evidence presented at trial in answering special issue number two. She unequivocally stated she would do so, and she specifically stated she would keep an open mind and give meaningful consideration to any mitigating evidence presented. (29 RR 36-39, 42-43, 65-66). *See Coleman*, 881 S.W.2d at 352. In fact, she told both sides that before answering special issue number two, she would listen to and consider various types of evidence, possibly including the person's character, age, mental-health issues, drug issues, or substance abuse. (29 RR 37-40, 65-66). Additionally, Stejskal indicated on her questionnaire that the defendant's character would be important to her in assessing punishment. (Stejskal Questionnaire at 4). Stejskal was not mitigation impaired, and the court properly denied this challenge. Stejskal was qualified to serve on the jury, and this Court should overrule Issue 16.

Issue 17: Zachary Niesman

Appellant requested one additional peremptory strike, which the trial court denied, and Zachary Niesman became juror number twelve. (29 RR 154-55). At trial,

Appellant challenged Niesman because he had read statistics showing that non-white people commit more crimes than white people do and that the death penalty is a deterrent. (29 RR 153). Appellant argued that Niesman's preconceived notions and beliefs would lead him automatically to answer "yes" to special issue number one because of Appellant's race. (29 RR 153-54).

On appeal, Appellant argues the trial court should have excused Niesman because he held pro-death-penalty beliefs. (Appellant's Br. at 99-100).[21] Appellant further argues Niesman would find him to be a future danger based on statistics showing that non-white people (like Appellant) are more violent than white people are. (Appellant's Br. at 100-01).[22] The record indicates otherwise.

Death Prone

Appellant contends that Niesman's questionnaire responses and testimony showed he held pro-death-penalty opinions and would automatically assess the death penalty. (Appellant's Br. at 99). The record refutes any such contention.

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[21] At trial, defense counsel challenged Niesman because he had read statistics showing that the death penalty is a deterrent. (29 RR 153). Appellant did not specifically preserve for appellate review his contention that Niesman held pro-death-penalty opinions and would assess a death sentence. *See* Tex. R. App. P. 33.1(a). Nonetheless, the State briefly addresses Appellant's first contention.

[22] In his brief, Appellant also makes passing references to Niesman's questionnaire answers related to certain mitigating circumstances, believing police officers, and the police charging someone. (Appellant's Br. at 100). There is no accompanying argument, nor were these answers raised at trial as bases for challenging Niesman. (Appellant's Br. at 100; 29 RR 153-54). If these references were intended to present additional grounds for excusing Niesman, they are inadequately briefed and the State will not address them.

Niesman's questionnaire and testimonial responses clearly show he would not automatically assess the death penalty. He testified the death penalty is appropriate and can be justified in certain cases—not all. (29 RR 76-77; Niesman Questionnaire at 1-2). Likewise, Niesman told defense counsel that imposition of the death penalty on every capital murderer would not be appropriate because the facts of each case and the individual's life experiences need to be examined. (29 RR 113). Niesman told both sides that while the death penalty can serve as a deterrent, an execution cannot bring a deceased victim back to life. (29 RR 76-77, 111-13; Niesman Questionnaire at 3).

Niesman made numerous unequivocal statements showing he would not render automatic answers nor automatically assess the death penalty. He characterized assessment of the death penalty as a "very heavily weighted decision" that required much evidentiary proof. (29 RR 125). Niesman firmly understood the two punishment-phase issues, and that the default sentence is life without parole. (29 RR 84-85, 87, 123, 127-28). Niesman promised to keep an open mind and listen to all the evidence before answering the two special issues. (29 RR 99). In fact, he agreed with defense counsel that the death penalty would be worthless if each juror did not individually decide the two special issues or understand his or her power to assess a life or death sentence. (29 RR 115, 128).

Niesman unequivocally told defense counsel that despite his "eye for an eye" belief, a sentence of life without parole would satisfy him if it was appropriate. (29 RR

152; Niesman Questionnaire at 3). He even wrote on his questionnaire, "Some situations might not justify the death penalty, but do call for life w/o parole. Punishment needs to fit the crime." (Niesman Questionnaire at 2). Actually, Niesman told defense counsel he could not assess a death sentence without considering a person's background or other factors. (29 RR 147; Niesman Questionnaire at 5, 7). In assessing punishment, he would "want to consider certain aspects of the case and other factors/deeds in the person's life." (Niesman Questionnaire at 3). In view of Niesman's foregoing testimony, he would not automatically assess a death sentence based on any belief that it served as a deterrent. The trial court properly overruled this challenge.

Special Issue Number One & Statistics Involving Commission of Crimes

Appellant contends that because Niesman had read statistics that non-white people commit more violent crimes than white people do, he would find Appellant, a non-white person, a future danger. (Appellant's Br. at 100-01). The record as a whole reflects otherwise.

Niesman would not render an automatic answer to special issue number one, as evidenced by his numerous unequivocal statements that he understood the issue's terms, would follow the law, and would hold the State to its burden of proving the answer should be "yes." (29 RR 91-95, 98-99, 103, 135-44, 149). Niesman confirmed the default answer is always "no." (29 RR 136-37). His explanation that the issue does

not instruct jurors to examine the offense itself showed he understood that jurors must inspect the evidence presented during the punishment phase. (29 RR 130-33, 136). Niesman firmly told both sides that in answering the issue, he would keep an open mind and listen to and weigh all the facts and evidence. (29 RR 93-94, 135, 144). Niesman's examples of evidence he thought the parties could present showed his willingness to consider evidence from both sides. (29 RR 134).

Niesman could imagine a situation in which a convicted capital murderer would not be a future danger, and he confirmed he could answer "no" to special issue number one, to assess life without parole. (29 RR 135, 141-42). He understood that if the jurors cannot unanimously agree the defendant would be a future danger, no juror is required to change his or her answer. (29 RR 138). Niesman's answers to both sides' inquiries, and detailed, thoughtful explanation of the issue's requirements, show he would not automatically answer "yes" to special issue number one.

Niesman discussed with both sides the following question on page 12 of his questionnaire: "Do you believe that some races and/or ethnic groups tend to be more violent than others?" (29 RR 107, 144-46; Niesman Questionnaire at 12). In response, Niesman checked "Yes," and wrote, "Statistics show more violent crimes are committed by certain races. I believe in statistics." (29 RR 107; Niesman Questionnaire at 12). Niesman told defense counsel that he learned the statistics from

news reports and criminology classes, and they showed that people of non-white races commit more violent crimes. (29 RR 144-45).

In his brief, Appellant has inaccurately presented Niesman's responses to defense counsel's questions. An entire examination of Niesman's responses on this topic is necessary to fully contextualize Appellant's contention. The questionnaire question above the one at issue reads: "Do you sometimes personally harbor bias against members of certain races or ethic groups?" (Niesman Questionnaire at 12). In response, Niesman checked "No." (Niesman Questionnaire at 12). During questioning, Niesman likewise explained to the prosecutor that his questionnaire response resonated from statistics only—not his own personal feelings toward one race or another. (29 RR 107). In fact, Niesman confirmed to the prosecutor that if he saw statistics showing something different, he would believe the different statistics if they resulted from a valid test. (29 RR 107).

Niesman assured defense counsel that Appellant's non-white race and the statistics he read would not affect his answer to special issue number one. (29 RR 144-45). Niesman explained he would "look at the case at hand and where a person's heart is and try to make a decision mentally on how I feel about that." (29 RR 145). Niesman further explained, "I don't think because of somebody's race they're more likely to commit a crime than somebody of a different race, but that wasn't the question that was asked [on the questionnaire]." (29 RR 145). Niesman assured

defense counsel he "would not feel differently about [Appellant] because he's an African American." (29 RR 146).

Placed in context, Niesman testified only that he had generally read statistics regarding the races of persons who commit violent crimes. He did not testify he personally believed these statistics, or that the content of the statistics reflected his own personal opinions. In fact, Niesman testified the statistics did not reflect his own personal opinions, and he would not consider Appellant's race in any way. Therefore, Appellant cannot show Niesman was biased against the law, such that he would render an automatic answer to special issue number one. The trial court did not abuse its discretion by denying Appellant's challenge. Niesman was fit to serve on the jury, and this Court should overrule Issue 17.

Issue 18: Robyn Byers

Robyn Byers was the first venireperson the parties questioned. (4 RR 6, 16). Appellant challenged Byers for cause, which the trial court overruled. (4 RR 111). Despite Appellant's assertion in his brief that he was forced to use a peremptory strike against Byers, the record actually shows that Byers was seated as juror number one. (Appellant's Br. at 103; 4 RR 112).

At trial, Appellant challenged Byers because she would not give proper consideration to his background and character, which made her mitigation impaired. (4 RR 111). Appellant also argued Byers lessened the State's burden of proving the

cases in which the death penalty was appropriate. (4 RR 111). The prosecutor responded that Byers was a qualified juror. (4 RR 111).

On appeal, Appellant complains the trial court should have excused Byers because she was mitigation impaired. (Appellant's Br. at 102). Appellant also contends Byers lessened the State's burden of proving that only cases charging capital murder—as opposed to murder—are eligible for the death penalty. (Appellant's Br. at 102). The record supports the trial court's ruling.

State's Burden

Appellant contends that Byers "lessened the burden of proof on the State regarding which cases the imposition of death would be appropriate." (Appellant's Br. at 102). The record indicates otherwise. Byers told defense counsel that she believed in the judicial process and wanted to do what the law required of her. (4 RR 66). She did not have an opinion as to Appellant's guilt and, therefore, would hold the State to its burden of proving each element. (4 RR 69).

Byers initially told the prosecutor that all murders should be death-penalty eligible. (4 RR 28-29). After she learned the law, however, Byers unequivocally stated she would follow the law and hold the State to its burden of proving every element of capital murder beyond a reasonable doubt. (4 RR 34-38). In support, Byers confirmed her understanding that not every murderer should receive the death penalty, as the State elects to seek capital punishment in only select cases. (4 RR 80-83). Moreover,

Byers indicated on her juror questionnaire that she believed the death penalty is appropriate in only some murder cases, not all. (Byers Questionnaire at 2). Accordingly, Byers held no bias against the law on the ground alleged, and the trial court properly overruled this challenge.

Mitigation Impaired

Appellant also contends Byers would not give meaningful consideration to mitigation evidence of his background and character. (Appellant's Br. at 102). On her questionnaire, Byers "somewhat disagreed" that a person's background, life history, accomplishments, or good deeds should not matter when assessing punishment. (Byers Questionnaire at 5). Byers also "disagreed completely" that genetics, circumstances of birth, upbringing, and environment should be considered. (Byers Questionnaire at 7). Byers would consider mental-health evidence. (Byers Questionnaire at 11).

Byers had no duty to consider any particular fact as mitigating. *Standefer*, 59 S.W.3d at 181. She was only obligated to consider all the evidence presented at trial in arriving at her answer to special issue number two. She unequivocally told both sides on numerous occasions that she would do so, and she specifically stated she would keep an open mind and consider any mitigating evidence presented. (4 RR 40, 49-55, 62, 66, 87, 93, 98-104, 106, 108-10). *See Coleman*, 881 S.W.2d at 352. Her questionnaire

responses did not disqualify her from jury service, especially in light of her testimonial answers, and the court properly denied this challenge as well.

The trial court was in the best position to evaluate Byers's demeanor and responses, and to assess her understanding of the law. *See Feldman*, 71 S.W.3d at 744. Based on the totality of the voir dire testimony, there is sufficient evidence to support the trial court's ruling, and the court did not abuse its discretion in denying Appellant's challenge for cause against Byers. This Court should overrule Issue 18.

Issue 19: Dazerick Parham

Dazerick Parham was the eighth venireperson questioned. (4 RR; 5 RR; 6 RR). Appellant challenged Parham for cause, which the trial court overruled. (6 RR 131-32). Appellant asserts in his brief that he was forced to use a peremptory strike against Parham. (Appellant's Br. at 104). The record does not support this claim, however, because Parham was seated as juror number two. (6 RR 131-32). At that time, Appellant had used only one peremptory challenge. (5 RR 155).

At trial, Appellant challenged Parham because he held an "eye for an eye" belief, and his non-responsiveness to special issue number one showed he did not understand the issue. (6 RR 131). Counsel urged that Parham's responses indicated "he is impermissibly, unconstitutionally predisposed to an automatic belief that guilty would automatically lead him to a 'yes' answer to Special Issue No. 1." (6 RR 131).

On appeal, Appellant complains that because Parham held an "eye for an eye" belief, a guilty verdict would lead him to assess the death penalty. (Appellant's Br. at 103). Appellant further complains that Parham did not understand special issue number one and could not verbalize whether or not he would automatically answer it "yes." (Appellant's Br. at 103). The record indicates otherwise.

Death Prone

Appellant argues that because Parham held an "eye for an eye" belief, he also believed someone who kills should be killed. (Appellant's Br. at 103). Parham's voir dire testimony and the remainder of his questionnaire refute Appellant's claim. Parham's questionnaire shows he believed the death penalty is appropriate in some cases, not all. (Parham Questionnaire at 2). He believed whether a person receives the death penalty "depends on the evidence and reason for the crime." (Parham Questionnaire at 4).

Parham explicitly stated that while he held an "eye for an eye" belief, the circumstances and the evidence would determine a convicted capital murderer's sentence. (6 RR 124-25; Parham Questionnaire at 3). He believed the best argument against the death penalty is that "no life should be taken." (Parham Questionnaire at 3). Indeed, Parham confirmed a person convicted of capital murder should "not always" receive a death sentence, and he would consider a sentence of life without

parole. (6 RR 124-25). In fact, Parham repeatedly confirmed that life without parole would be a sufficient punishment. (6 RR 125, 127, 129; Parham Questionnaire at 5).

Defense counsel inquired into Parham's questionnaire response that he believed a person who commits robbery and murder should receive the death penalty. (6 RR 113; Parham Questionnaire at 3). Parham explained he did not believe the death penalty was an appropriate punishment for everyone. (6 RR 114). *See Gardner*, 306 S.W.3d at 295 (holding when the record reflects that a prospective juror vacillated or equivocated on his ability to follow the law, the reviewing court must defer to the trial judge). Here, Parham was a vacillating juror, indicating he would follow the law, but also stating he also believed in an "eye for an eye." Thus, particular deference must be given to the trial court's ruling.

Moreover, Parham made numerous unequivocal statements showing he had a clear understanding of the law, would follow the court's special-issue instructions, and would not render automatic answers. The prosecutor explained the law does not allow jurors to render automatic answers to the special issues, and the jury must hear the evidence before making decisions; Parham understood and agreed with the law's mandates. (6 RR 87-92). He repeatedly confirmed he would not automatically answer "yes" to either special issue, agreeing the answers were not predetermined. (6 RR 111-13, 115, 127-29). Thus, Parham held no bias against the law governing the special issues, and the court properly denied this challenge.

Special Issue Number One

Appellant argues Parham did not understand special issue number one, and the defense could not ascertain whether he would automatically answer it "yes." (Appellant's Br. at 103). The record indicates otherwise. Indeed, Parham clearly understood both sides' explanations of the law regarding special issue number one, and his responses show no indication he would be challengeable for cause due to a bias against the law regarding the first special issue. On numerous occasions, Parham unequivocally told both sides that he would keep an open mind, listen to the evidence, and consider all the evidence in answering special issue number one. (6 RR 87-92, 97-98, 107-10, 114). Parham would even consider a prison expert's testimony. (6 RR 116-17). He confirmed he would never answer "yes" to the special issue unless he was convinced the defendant would probably commit future acts of violence. (6 RR 117). Parham emphatically told both sides he would hold the State to its burden of proving future dangerousness. (6 RR 97-98, 128). Parham did not hold a bias against the law of special issue number one, and the court properly denied this challenge. Parham was qualified to sit on the jury, and this Court should overrule Issue 19.

Issue 20: David Slear

David Slear was the seventeenth venireperson questioned. (4 RR; 5 RR; 6 RR; 7 RR; 8 RR; 9 RR). Appellant challenged Slear for cause, which the trial court overruled. (9 RR 145-46). Appellant claims on appeal that defense counsel was forced

to use a peremptory strike against Slear. (Appellant's Br. at 104-05). However, the record does not support Appellant's claim because Slear was seated as juror number three. (9 RR 146). At the time Appellant challenged Slear, he had used only four peremptory challenges. (5 RR 155; 7 RR 80; 7 RR 152; 8 RR 75).

At trial, Appellant challenged Slear because he would not follow the law in answering special issue number one. Specifically, Slear would not require the State to prove the defendant constituted a "continuing" threat to society; rather, he would answer "yes" if the State proved he posed only a threat to society. (9 RR 145-46). On appeal, Appellant argues the trial court abused its discretion in denying his challenge. (Appellant's Br. at 104). The record reflects otherwise.

Slear unequivocally and repeatedly told both parties he understood special issue number one, and that the State holds the burden of proving that it should be answered "yes." (9 RR 92-96, 102, 128-29). Slear would not automatically answer the issue "yes," and he understood the inquiry starts with an answer of "no." (9 RR 92-96, 102, 122-23, 128, 137-38). Slear said that even in a heinous case, he would not automatically answer "yes" to the issue because he would need all the facts. (9 RR 98-99).

Slear's own testimony shows he would require the State to prove the defendant was a continuing threat to society. He interpreted special issue number one to mean "a judgment of how likely the defendant would be to do something like this again, to

be a threat to society." (9 RR 92). Slear clarified to defense counsel the issue requires finding the defendant a continuing threat based on multiple criminal acts of violence. (9 RR 128). Slear noted, "[I]f there is proof or it is proven beyond a reasonable doubt to me that there is a probability or a high probability that there would be even one – another murder that happens because of this, I think that would lead me toward saying [yes to] Special Issue No. 1." (9 RR 129). Slear clarified, however, that differing levels of violence all encompass violent acts, and he understood the special issue requires criminal acts that will constitute a continuing threat. (9 RR 129).

Slear only once stated the defendant would be a "threat," as opposed to a "continuing threat." (9 RR 92, 129). After the parties clarified that the issue required a "continuing threat," Slear indicated his understanding. The record contains no statement or inference from Slear that indicates he would refuse to follow the law and answer "yes" if the State proved the defendant was just a threat, as opposed to continuing threat, to society. Slear held no bias against the law governing special issue number one. The trial court was in the best position to evaluate Slear's demeanor and responses, and to assess his understanding of the law regarding the State's burden of proof in special issue number one. *See Feldman*, 71 S.W.3d at 744. The court properly overruled this challenge. Slear was qualified to sit on the jury, and this Court should overrule Issue 20.

Issue 21: Christopher Taylor

Christopher Taylor was the twenty-seventh venireperson questioned. (4 RR; 5 RR; 6 RR; 7 RR; 8 RR; 9 RR; 10 RR; 11 RR; 12 RR). Appellant challenged Taylor for cause, which the trial court overruled. (12 RR 88). Appellant claims on appeal that he was forced to use a peremptory strike against Taylor. (Appellant's Br. at 105). However, the record does not support Appellant's claim because Taylor was seated as juror number four. (12 RR 89). At that time, Appellant had used only five peremptory challenges. (5 RR 155; 7 RR 80; 7 RR 152; 8 RR 75; 10 RR 70).

At trial, Appellant challenged Taylor because he did not "have a full ability to consider the full range of … mitigating factors regarding the defendant's background and environment." (12 RR 88). Appellant added that special issue number two confused Taylor, and therefore the court should exclude him. (12 RR 88).

On appeal, Appellant argues the trial court should have granted his challenge against Taylor because his answers were "vague and confused as to Special Issue No. 1," and he "did not have a full ability to consider mitigating factors regarding the Defendant's background and environment." (Appellant's Br. at 105).

Appellant did not preserve for appellate review his contention that special issue number one confused Taylor, because Appellant did not raise this argument in the trial court. *See* Tex. R. App. P. 33.1(a). Thus, the State will focus only on the reason asserted at trial as the basis for the for-cause challenge. Appellant's issue should fail.

Appellant contends Taylor would not fully consider his background and environment in mitigation. (Appellant's Br. at 105). Taylor had no duty to consider any particular fact as mitigating. *Standefer*, 59 S.W.3d at 181. He was only obligated to consider all the evidence presented at trial in arriving at his answer to special issue number two. He unequivocally told both sides on numerous occasions that he would do so, and he specifically stated he would keep an open mind and consider any mitigating evidence presented, including the defendant's character, background, and personal moral culpability. (12 RR 39-43, 78, 83, 86-87). *See Coleman*, 881 S.W.2d at 352.

When determining punishment, Taylor disagreed on his questionnaire that a person's background or life history should be considered, and he somewhat disagreed that accomplishments or good deeds should be considered. (12 RR 43, 85-87; Taylor Questionnaire at 5). Despite his written response, Taylor assured both sides he would listen to such mitigating evidence if presented and then determine whether it mattered. (12 RR 43, 85-87). Taylor even told defense counsel that in addition to all of the facts, he would want to hear evidence of the defendant's background. (12 RR 86-87). Taylor unequivocally told defense counsel he would look at everything to fairly and truly consider whether he heard sufficiently mitigating evidence. (12 RR 87).

The trial court was in the best position to evaluate Taylor's demeanor and responses, and to assess his understanding of the law. *See Feldman*, 71 S.W.3d at 744.

Based on the totality of the voir dire testimony, there is sufficient evidence to support the trial court's ruling. Taylor did not harbor a bias against the law governing mitigation, and the court properly overruled this challenge. This Court should overrule Issue 21.

CONCLUSION

Appellant has not shown even one erroneous ruling on his challenges for cause, much less three erroneous rulings. *See Saldano,* 232 S.W.3d at 93. Therefore, he has not shown this Court that he was denied the use of a statutorily provided peremptory strike. Issues One through 21 should be overruled.

RESPONSE TO ISSUES 22-23

The trial court's denial of Appellant's challenges for cause did not deprive him of a lawfully constituted jury.

In Issues 22 and 23, Appellant contends the trial court's denial of his challenges for cause deprived him of a lawfully constituted jury, resulting in violations of his rights under the state and federal constitutions and under article 35.16 of the Texas Code of Criminal Procedure. (Appellant's Br. at 106-08).

Appellant has failed to show he was deprived of a lawfully constituted jury, and his contentions are meritless. Under controlling precedent, a defendant's use of a peremptory strike to "cure" an improper denial of a challenge for cause does not violate due process. *See United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000). Moreover, Appellant has failed to show the trial court's rulings on any of the

challenges resulted in the seating of a juror who was biased or prejudiced. If an appellant does not present record evidence demonstrating that the trial court's error deprived him of a jury comprised of legally qualified jurors, he has suffered no harm, and the reviewing court should presume the jurors are qualified. *See Gray v. State*, 233 S.W.3d 295, 301 (Tex. Crim. App. 2007). Accordingly, this Court should overrule Issues 22 and 23.

RESPONSE TO ISSUE 24

The evidence is legally sufficient to support Appellant's conviction for capital murder, and there is sufficient evidence to corroborate the accomplice-witness testimony.

In Issue 24, Appellant contends that the evidence is legally insufficient to prove he committed the offense of capital murder. Appellant concedes that he was present at the scene of the offense but argues that the only evidence implicating him in the murder of Dr. Hatcher was the accomplice-witness testimony of Crystal Cortes, which was not truthful and was not sufficiently corroborated. (Appellant's Br. at 108-16). Appellant appears to be conflating two separate issues: (1) whether the evidence is legally sufficient to support his conviction under *Jackson v. Virginia*, 443 U.S. 307 (1979); and (2) whether the accomplice-witness evidence is sufficiently corroborated under article 38.14 of the Texas Code of Criminal Procedure.

This point of error is multifarious because it is based on more than one legal theory and raises more than one specific complaint. *See Davis v. State*, 329 S.W.3d 798,

820 (Tex. Crim. App. 2010) (holding that because appellant based a single point of error on more than one legal theory, the entire point of error was multifarious); *Stults v. State*, 23 S.W.3d 198, 205 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (holding that a multifarious issue is one that embraces more than one specific ground or that attacks several distinct and separate rulings of the court). This, alone, is a sufficient basis for rejecting this point of error. *See Mays v. State*, 318 S.W.3d 368, 385 (Tex. Crim. App. 2010) (noting that a multifarious issue "risks rejection on that basis alone").

Nonetheless, in an abundance of caution, the State will address both issues.

LEGAL SUFFICIENCY UNDER *JACKSON V. VIRGINIA*

Applicable Law

Due process requires that the State prove, beyond a reasonable doubt, every element of the crime charged. *Jackson*, 443 U.S. at 313. In reviewing a challenge to the sufficiency of the evidence, appellate courts examine all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Id.* at 319; *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). This standard accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319. When the record supports conflicting inferences, an appellate court

presumes that the factfinder resolved the conflicts in favor of the prosecution and therefore defers to that determination. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Direct and circumstantial evidence are equally probative, and circumstantial evidence can alone be sufficient to establish guilt. *Id.*

Under the *Jackson v. Virginia* sufficiency standard, uncorroborated accomplice-witness testimony can be sufficient to support a conviction. *Taylor v. State*, 10 S.W.3d 673, 684-85 (Tex. Crim. App. 2000). An appellate court must consider all the evidence—even improperly admitted evidence—in a legal-sufficiency review. *Clayton*, 235 S.W.3d at 778 (stating that an appellate court's review of "all the evidence" includes evidence that was properly and improperly admitted). Thus, in assessing the legal sufficiency of the evidence in this case, Cortes's accomplice-witness testimony is considered, whether sufficiently corroborated or not.

Here, in order to obtain a conviction for capital murder, the State was required to prove that Appellant intentionally caused the death of Kendra Hatcher by shooting her with a firearm, a deadly weapon, while in the course of committing or attempting to commit robbery. (Supp CR: 323, 333); Tex. Penal Code Ann. § 19.03(a)(2).

The Evidence is Legally Sufficient to Support Appellant's Conviction for Capital Murder

The evidence at trial showed that Dr. Hatcher was dating Dr. Paniagua, Delgado's former boyfriend. Delgado was heartbroken over her breakup with Dr. Paniagua and jealous of his new relationship with Dr. Hatcher. Delgado wanted to

eliminate Dr. Hatcher so that she and Dr. Paniagua could be together again. Delgado approached several friends and family members about helping her kill Dr. Hatcher, but they all refused to get involved. Eventually, Delgado recruited Cortes and Appellant to kill Dr. Hatcher for her. Delgado promised to pay Cortes $500 for her participation as the driver, and she promised Appellant drugs and money to participate as the shooter. Appellant, Cortes, and Delgado met several times to discuss and plan the offense. They decided to make the murder look like a robbery that went awry. They stalked Dr. Hatcher daily at her home and work to learn her schedule and determine the best time to commit the murder. They discussed several methods for killing Dr. Hatcher, but Appellant convinced Delgado and Cortes that it would be easiest to kill her with a gun, and Appellant obtained the .40 Smith & Wesson that was used during the offense.

The morning of the offense, Delgado borrowed a Jeep Cherokee from Ortiz, an old friend, for Cortes to drive during the offense. That evening, Cortes and Appellant went to Dr. Hatcher's apartment in the Jeep and waited in her parking garage for her to return home from work. After Dr. Hatcher pulled into the garage, Appellant put on his gloves, grabbed his pistol, and exited the vehicle. Cortes heard Dr. Hatcher scream and then shots fired. Cortes backed out of the parking spot, and Appellant got back into the Jeep. Appellant had in his possession Dr. Hatcher's purse, a Nikon camera, and the pistol. Cortes drove down the ramp thinking there was

another exit below, but once she realized there was not an exit, she turned around and came back up the ramp to go out of the main entrance. As they drove back up the ramp toward the exit, Cortes saw Dr. Hatcher's dead body lying on the ground of the parking garage.

Saad, one of Dr. Hatcher's neighbors, came out of the elevators on the lowest level of the parking garage as the offense was occurring. Saad heard screaming, one or two gunshots, the shutting of a car door, and the screeching of tires. He then saw a Jeep Cherokee drive fast down the ramp from the level above, make a left, and pass behind his car. Saad backed out of his parking spot and drove up the ramp toward the exit of the garage. The Jeep turned around on the lower level, came up the ramp, and followed him out of the garage. Saad saw Dr. Hatcher's dead body lying on the ground of parking garage as he drove toward the exit. Saad called 911 as soon as he exited the garage. Security footage from the parking garage confirmed the series of events as reported by Cortes and Saad.

Several officers and paramedics were dispatched to the parking garage after Saad called 911. Upon arrival, they found Dr. Hatcher lying on the ground next to her white Toyota Camry. There was blood at the scene and trauma to her chin. The paramedics attempted CPR, but Dr. Hatcher showed signs incompatible with life and was pronounced dead at the scene. The medical examiner determined that Dr.

Hatcher's cause of death was a gunshot wound to the head and neck, and the manner of death was a homicide.

After Cortes and Appellant fled from the parking garage, they went to an abandoned house in Pleasant Grove where they cleaned the Jeep with disinfectant and removed the paper tags they had put on the vehicle earlier that day. Cortes dropped Appellant off at his apartment, and he kept the murder weapon in his possession. Around this time, Delgado called Cortes and asked if the task was complete. Cortes said "yes," and they made a plan to meet at Ortiz's house to return the Jeep. Security footage from Ortiz's neighbor's house captured Cortes meeting Delgado at Ortiz's house and returning the Jeep. As promised, Delgado paid Cortes $500 for driving Appellant to kill Dr. Hatcher, and Delgado gave Appellant some Kush, cocaine, and money for killing Dr. Hatcher.

The day after the offense, the police released a still image of the Jeep Cherokee to the media. Ortiz saw the news coverage and notified the police that the Jeep Cherokee he saw on the news belonged to him. During questioning at the police station, Ortiz told the police that he had loaned the vehicle to his friend, Delgado, the previous day. Delgado was brought in for questioning. She seemed prepared for her police interview and provided an alibi for the time of the offense. She adamantly denied driving the Jeep and told the police that her friend, Cortes, had driven it that day. Cortes was then also brought in for questioning. Like Delgado, Cortes was eager

to speak to the police, but it did not take long during questioning for her story to fall apart. Eventually, Cortes admitted to being part of the offense as the driver, and she was arrested and charged with capital murder. Over the next few weeks, she continued to talk to the police, eventually giving them information that led to the identification and apprehension of the shooter, Appellant.

While Appellant was being questioned at the police station, officers executed a search warrant on his vehicle and discovered the murder weapon inside. Although Appellant had previously denied knowing Cortes or Delgado, when the police confronted him with the information that the murder weapon was found in his vehicle, he claimed he bought the gun from Cortes after the offense. However, the date he provided was when Cortes was already in jail. Eventually, Appellant admitted to being present during the murder, but he claimed Cortes was the shooter. He told the police that it was supposed to be just a robbery and that he was struggling with Dr. Hatcher over her property when Cortes backed up the vehicle and shot her. Appellant was arrested for capital murder and booked into the Dallas County Jail. Later that day, he made inculpatory statements during a jail call with his girlfriend.

The cell phone evidence showed that, in the two weeks leading up to the offense, there was frequent interaction between Delgado and Cortes, between Cortes and Appellant, and between Appellant and a contact labeled "Mustang." Appellant had started communicating with the contact labeled "Mustang" around the same time

he met Delgado. The evidence showed that Delgado frequently drove her cousin's Mustang, so this was believed to be an alias for Delgado. The cell phone evidence also placed Cortes and Appellant together the day of the offense. After Appellant was arrested, the police searched his phone and found images of the same type of gun that was used in the offense. They also discovered that, right after the murder, Appellant conducted web searches for news articles about the offense and for businesses near his apartment where he could sell or trade guns.

Appellant argues that there were two divergent stories as to how the offense occurred and that the only evidence implicating him in the shooting of Dr. Hatcher was the testimony of Cortes, an admitted liar. However, it was the jury's duty to resolve conflicts in the testimony and to weigh the evidence. *Jackson*, 443 U.S. at 319. The jury is presumed to have resolved any conflicts in favor of the verdict, and this Court must defer to that resolution. *Clayton*, 235 S.W.3d at 778 (stating that when the record supports conflicting inferences, an appellate court presumes that the factfinder resolved the conflicts in favor of the prosecution and defers to that determination).

Viewing all the evidence in the light most favorable to the verdict, a rational jury could find beyond a reasonable doubt that Appellant was guilty of capital murder. Therefore, the evidence is legally sufficient to support his conviction.

SUFFICIENCY UNDER THE ACCOMPLICE-WITNESS RULE

Applicable Law

Under Texas law, a conviction cannot be had upon the testimony of an accomplice unless corroborated by other non-accomplice evidence tending to connect the defendant with the offense committed. *See* Tex. Code Crim. Proc. Ann. art. 38.14. Corroboration is insufficient if it merely shows the commission of an offense. *See id.*

Traditional legal-sufficiency standards do not apply to a review of corroborating evidence. *Cathey v. State*, 992 S.W.2d 460, 462–63 (Tex. Crim. App. 1999); *Cantelon v. State*, 85 S.W.3d 457, 460 (Tex. App.—Austin 2002, no pet.). When conducting a sufficiency review under the accomplice-witness rule, a reviewing court must eliminate the accomplice testimony from consideration and then examine the remaining portions of the record to see if there is any evidence that tends to connect the accused with the commission of the crime. *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008) (citing *Solomon v. State*, 49 S.W.3d 356, 361 (Tex. Crim. App. 2001)). The non-accomplice evidence does not have to directly link the appellant to the crime, nor does it alone have to establish his guilt beyond a reasonable doubt. *Gill v. State*, 873 S.W.2d 45, 48 (Tex. Crim. App. 1994). Further, there is no requirement that the non-accomplice testimony corroborate the accused's connection to the specific element that raises the offense from murder to capital murder. *Joubert v. State*, 235 S.W.3d 729, 731 (Tex. Crim. App. 2007). There need only be some non-

accomplice evidence tending to connect the defendant to the crime, not to every element of the crime. *Id.*

There is no set amount of non-accomplice corroboration evidence that is required for sufficiency purposes; each case must be judged on its own facts. *Malone*, 253 S.W.3d at 257 (citing *Gill*, 873 S.W.2d at 48). A reviewing court must view the corroborating evidence in the light most favorable to the jury's verdict. *Brown v. State*, 270 S.W.3d 564, 567 (Tex. Crim. App. 2008) (citing *Gill*, 873 S.W.2d at 48). When there are conflicting views of the evidence—one that tends to connect the accused to the offense and one that does not—the appellate court must defer to the factfinder's resolution of the evidence. *Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011).

The Non-Accomplice Evidence is Sufficient to Connect Appellant to the Offense

The non-accomplice evidence showed that law enforcement initially identified Appellant as a person of interest by his cell phone number, which appeared in multiple phone records of individuals they were looking at in connection with the offense. When Appellant was detained and brought in for questioning, he repeatedly denied knowing Brenda Delgado or Crystal Cortes. He told Detective Barnes that he did not know his way around town because he had just moved to Dallas and only hung out in one general area near his apartment. Throughout his police interview, he showed a lack of emotion or sympathy and was more concerned about a basketball game than about the fact that someone had been murdered.

While Appellant was being interviewed by Detective Barnes, another detective executed a search warrant on Appellant's vehicle. A gun matching the caliber of the gun used during the murder was found hidden in the center console of the vehicle. Subsequent testing confirmed that the fired cartridge case found on the floorboard of Dr. Hatcher's vehicle was fired from the gun found in Appellant's vehicle. Possession of the murder weapon is proper corroborative evidence. *See Jackson v. State*, 745 S.W.2d 4, 13 (Tex. Crim. App. 1988)*; Cockrum v. State*, 758 S.W.2d 577, 582 (Tex. Crim. App. 1988).

When Detective Barnes confronted Appellant with this information, there was a noticeable change in his demeanor. Although Appellant had previously denied knowing Cortes, he now claimed he bought the gun from her after the offense. However, the date he gave was when Cortes was already in jail. Appellant's implausible explanation was probative evidence of wrongful conduct and can be considered as a suspicious circumstance tending to connect him to the offense. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (inconsistent statements and implausible explanations to the police are probative of wrongful conduct and are also circumstances of guilt).

Eventually, toward the end of his police interview, Appellant admitted to participating in the offense but denied shooting the victim. He told Detective Barnes that it was supposed to be a robbery and that he was struggling with Dr. Hatcher over

her property when Cortes backed up the vehicle and shot her. Under most circumstances, an admission or confession will be sufficient to corroborate the accomplice-witness testimony. *See Brown*, 270 S.W.3d at 568; *Jackson v. State*, 516 S.W.2d 167, 171 (Tex. Crim. App. 1974). The question is whether some evidence "tends to connect" the accused to the crime; the connection need not establish the exact nature of his involvement as a principal or party. *Joubert*, 235 S.W.3d at 731. Although Appellant's version of events differed from that of Cortes, his admission that he was involved in the events was sufficient to corroborate and connect him to the offense. *See id.* (holding that defendant's admission that he participated in the crime, although he denied being a shooter, was enough to tend to connect him to the offense).

Appellant also made incriminating admissions in a recorded jail call with his girlfriend, Mericka Swint. During the call, Swint asked Appellant why he would keep the gun, and his response was: "I don't know, man. Stupid as fuck." Later during the call, Swint said: "If you shot that girl with that gun, you should've…threw it away or something." Appellant replied: "I know, man, I know. Too late now though." This was an additional admission that tended to connect him to the offense.

In addition to Appellant's admissions, there was other non-accomplice evidence that tended to connect Appellant to his co-defendants and to the offense. Angelica Gordon lived with Kelly Ellis in an apartment in South Dallas in August

2015. She testified that Appellant, Cortes, and Delgado had what appeared to be planning meetings at Ellis's apartment multiple times in the weeks leading up to the offense. Cell phone records reflected that Appellant started having frequent cell phone communication with Cortes in August 2015, and that their interaction stopped on September 4, 2015, two days after the offense. *See, e.g., Lopez v. State*, 565 S.W.3d 879, 885 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd)(evidence of a high volume of calls between the defendant and his accomplice several days before and on the day of the murder was strong circumstantial evidence linking the defendant with the crime); *Longoria v. State*, 154 S.W.3d 747, 758 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (evidence of a flurry of communications between the defendant and other perpetrators during the course of the offense and immediately after was strong circumstantial evidence that tended to connect the defendant to the crime).

On the day of the offense, Appellant's cell phone hit on the tower near the Jack-in-the-Box located at I-35 and Royal Lane at 10:26 a.m., and Cortes's phone hit near the same location at 10:34 a.m. At 11:31 a.m., Appellant's cell phone hit on a tower near Dr. Hatcher's apartment, and Cortes's phone hit near the same location at 11:37 a.m. *See McDuff v. State*, 939 S.W.2d 607, 613 (Tex. Crim. App. 1997) (evidence that the defendant was in the company of the accomplice at or near the time or place of the offense is proper corroborating evidence). Appellant's phone was inactive from 3:29 p.m. until 7:47 p.m., and Cortes's phone was inactive from 4:17 p.m. until 7:47

p.m., suggesting that they both turned their phones off during the commission of the offense.

Appellant's cell phone records further reflected that, the day after the offense, he conducted web searches for "killings in Dallas," "Woman murdered in Uptown Dallas parking garage," and "Dallas news today." He also searched for "gun shop in 75237," his zip code, and "Gold & Gun Swap Shop" in Dallas. Over the next two weeks, he continued to conduct web searches for "Dallas homicide" and for specific news articles pertaining to the murder of Dr. Kendra Hatcher. His phone also contained images of the same type of gun that was used in the offense. This was further evidence that tended to connect him to the offense.

The combined force of the above evidence, when considered in the light most favorable to the jury's verdict, tends to connect Appellant to the offense and therefore sufficiently corroborates Cortes's testimony. *See* Tex. Code Crim. Proc. Ann. art. 38.14; *Joubert*, 235 S.W.3d at 731.

Based on the foregoing, Issue 24 is without merit and should be overruled.

RESPONSE TO ISSUE 25

Texas courts no longer examine the factual sufficiency of the evidence.

In Issue 25, Appellant argues that the evidence is factually insufficient to support his conviction for capital murder. However, this Court has determined that factual sufficiency review, as outlined in *Clewis v. State*, 922 S.W.2d 126, 131–32 (Tex.

Crim. App. 1996), no longer applies in criminal cases. *See Brooks*, 323 S.W.3d at 912 (overruling *Clewis* and holding that the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense). Accordingly, Issue 25 should be overruled.

RESPONSE TO ISSUES 26-28

The trial court did not abuse its discretion by admitting the testimony of Jennifer Escobar, Moses Martinez, and Crystal Cortes over Appellant's hearsay objections.

In Issues 26 through 28, Appellant contends the trial court erred in overruling his hearsay objections to testimony detailing statements that co-conspirator Brenda Delgado made while planning Dr. Hatcher's murder. The trial court properly overruled Appellant's objections pursuant to well-established law. Thus, his contentions are without merit and this Court should overrule them.

THE COMPLAINED-OF TESTIMONY

Jennifer Escobar

In Issue 26, Appellant argues the trial court erred by overruling his hearsay objection and allowing Jennifer Escobar, Delgado's former roommate, to testify about Delgado's attempts to recruit her to kill Dr. Hatcher. (Appellant's Br. at 118-19, 121-23). The record reflects the following exchange during Escobar's direct examination:

Q. Okay. Now, Jennifer, at some point Brenda brings you into a plan that she has involving a woman by the name of Kendra Hatcher?

A. Yes, sir.

Q. And what was that plan?

MR. JOHNSON: Your Honor, I'm going to object to this as hearsay.

THE COURT: Sustained.

Q. (BY MR. BROOKS) At some point did Brenda –

MR. BROOKS: Your Honor, may we approach?

THE COURT: Yes.

(Sidebar conference off the record.)

Q. (BY MR. BROOKS) Jennifer, let me ask you again. Now, at some point Brenda reaches out to you and asks you to help do something?

A. Yes, sir.

Q. And she offers you money to do that?

A. Yes, sir. She offers –

Q. How – how much money did she offer you?

MR. JOHNSON: Your Honor, again, I'm going to – the conversation we had at the sidebar, I would like to make my – renew my objection to hearsay in – in the presence of the jury.

THE COURT: Thank you. Overruled.

Q. (BY MR. BROOKS) What did she -- what did she offer you?

A. She offers me $2,000, plus a car.

Q. And for $2,000 and a car, what were you supposed to do?

MR. JOHNSON: Your Honor, excuse me, could we approach again briefly, sidebar?

THE COURT: Yes.

(Sidebar conference off the record.)

THE COURT: All right. Members of the jury, I'm going to ask you to step out in the hall just for a very brief second, and then we'll bring you right back in.

THE BAILIFF: All rise.

(Jury excused from courtroom.)

THE COURT: Please be seated.

(Outside the presence of the jury.)

MR. JOHNSON: Your Honor, pursuant to the pretrial motions that were filed in the – particularly the motion detailing or requesting to have full recordation of all proceedings, including anything that might occur at sidebar that would have a relevance for any particular either appellate purpose or writ purpose, I had objected to the last two witnesses in regards to various statements made by indicted coconspirators or alleged indicted coconspirators, alleged accomplices to the defense.

The Court sustained my objection to hearsay as to the last area of inquiry. And when we approached the sidebar, the State offered a hearsay exception to that. And the Court agreed to change its ruling. But I would like to be – to be able to formalize the basis for the Court's ruling on the record for purposes of appellate review.

THE COURT: Thank you.

MR. BROOKS: Judge, the statements that were offered by this witness are against the penal interest of an indicted coconspirator, Brenda Delgado. And it's in furtherance of the conspiracy itself.

THE COURT: Thank you.

MR. JOHNSON: And, Your Honor, again, we still object to it as hearsay with respect to the Court's ruling.

THE COURT: I understand. Thank you, sir.

MR. JOHNSON: That's all I have.

And, yes, could we have a running objection to the entirety of this – any oral statements made by any un – or any indicted coconspirators?

THE COURT: Yes.

THE BAILIFF: All rise.

(Jury returned to courtroom.)

THE COURT: Thank you. Please be seated.

Q. (BY MR. BROOKS) Okay. Ms. Escobar, I think where we left off was I had asked you what you were supposed to do for – in exchange for $2,000 and a car.

A. She – she had several plans. First, it was Ricky. Put him in a coma or beat him up, or just eliminate Hatcher.

Q. Did she describe to you how she wanted either of those things to happen?

A. For – for Ricky, she had bought a bat, some type of needle. I don't know what – what it contained, basically for him – to put him to sleep. She wanted to capture – to follow around Hatcher and basically eliminate her. She had so many – so many ways of – one was going to her car. Basically whenever she would get in her car, grab her from the

front and just stab her with the needle that I'm describing. Two, just go and beat her up.

(37 RR 146-50).

Moses Martinez

In Issue 27, Appellant argues the trial court erred by overruling his hearsay objection and allowing Moses Martinez, Brenda Delgado's cousin, to testify about Delgado's attempts to recruit him to kill Dr. Hatcher. (Appellant's Br. at 119-23). The record reflects the following exchange during Martinez's direct examination:

Q. Had [Delgado] talked to you about Dr. Ricardo Paniagua?

A. Yes.

Q. Had she talked to you about how they had broken up?

A. Yes, sir.

Q. Okay. Had she talked to you about how she wanted to get back at him?

A. Yes, sir.

Q. Did she make any reference or talk to you at all about wanting – at least starting off, to hurt Dr. Paniagua?

A. Yes.

MR. JOHNSON: Your Honor, I'm going to object to this as asking for hearsay responses.

THE COURT: Overruled.

Q. (BY MR. BROOKS) You can answer the question. Did she make any – say anything to you about wanting to hurt Ricky?

A. Yes, she said that. But when she was talking like that, she was – she was drinking at the time. Every time I see her, she was just – she was not in her right mind. She was just – every time we see her, like she was just drunk. She was just drinking a lot. I don't know because of what was going on, but she was always – she wasn't there.

Q. Okay. But she would have conversations with you about doing things like that, and then at some point did those conversations turn to hurting a girl named Kendra?

A. Yes.

Q. Okay. Now, did she ever talk to you specifically about how she wanted you to do it?

A. She just said she wanted me to hit her with the – with the bat. And that's when I told her I didn't want to do that, like it's not worth it. It's someone innocent. I told my uncles, and that's when we stopped talking because they didn't believe me.

Q. Okay. Did you also tell your mom?

A. I told my mom, and my mom tried to talk to them, but nobody, you know, would expect that, so they didn't believe me because they saw her as an innocent woman that would never do nothing. So after five months passed, nothing happened. And then when it did happen, then that's when they started believing me.

Q. It's a little late then, wasn't it?

A. Yeah.

Q. Okay. Now, you mentioned a bat. She had said something about a bat to you. What does this appear to be to you?

A. It's a bat.

Q. It's a bat? Do you know if she had already bought a bat when she was talking to you about this?

A. Yes.

Q. And that would be – I just showed you State's Exhibit 136.

A. Yes, sir.

Q. So you made – you made the decision that what she's asking you is not a good idea?

A. Yes.

Q. Did she offer you help with your child support?

A. She offered me money.

Q. And she offered you money?

A. I told her I wouldn't do it for money, for nothing.

Q. What about a car? Did she offer to help you with a car?

A. Offered me a car.

Q. And you're not comfortable having to say these things?

A. Huh-uh.

Q. Even though you know what she was doing was wrong; is that a fair statement?

A. Can you say it again?

Q. You're not comfortable having to come in here and say these things even though you know what she was asking was wrong?

A. Yes.

Q. She is part of your family?

A. She is, but what she did was wrong.

(37 RR 138-41).

Crystal Cortes

In Issue 28, Appellant argues the trial court erred by overruling his hearsay objection and allowing Crystal Cortes to testify about Delgado's statements to her in recruiting her to help kill Dr. Hatcher. (Appellant's Br. at 120-23). The record reflects the following exchange during Cortes's direct examination:

> Q. Now, at some point Brenda starts talking to you about someone named Kendra Hatcher?
>
> A. Yes.
>
> Q. Okay. What kinds of things is she talking to you about?
>
> A. She said that Kendra Hatcher –
>
> MR. JOHNSON: Excuse me. Excuse me, Judge. Again, I'm going to object to hearsay at this time.
>
> THE COURT: Sustained.
>
> MR. BROOKS: Excuse me, Judge. Statement against interest, coconspirator testimony.
>
> THE COURT: Overruled.
>
> Q. (BY MR. BROOKS) You can answer.
>
> A. Okay. She said that Kendra Hatcher, she hated her, she didn't want anything to do with her. She already knew where Kendra lived. She pretty much said she wanted to do away with Kendra.

(38 RR 33-34).

APPLICABLE LAW

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tex. R. Evid. 801(d). Generally, hearsay is inadmissible except as provided by statute or the Rules of Evidence. Tex. R. Evid. 802.

Texas Rule of Evidence 803(24)

One exception to the hearsay rule is a statement against penal interest. Under Texas Rule of Evidence 803(24), such a statement is admissible if at the time it was made, it so tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless she believed it was true. Tex. R. Evid. 803(24). The rationale behind admitting these types of statements "stems from the commonsense notion that people ordinarily do not say things that are damaging to themselves unless they believe they are true." *Walter v. State*, 267 S.W.3d 883, 890 (Tex. Crim. App. 2008)(citing *Williamson v. United States*, 512 U.S. 594, 598 (1994)). Under this exception, a statement that is self-inculpatory can be admissible against a defendant who was not the declarant of the statement. *Dewberry v. State*, 4 S.W.3d 735, 751 (Tex. Crim. App. 1999).

Rule 803(24) sets out a two-step foundation requirement for the admissibility of hearsay statements against a person's penal interest. *Walter*, 267 S.W.3d at 890 (citing *Dewberry*, 4 S.W.3d at 751). First, the trial court must determine whether the

statement, considering all the circumstances, subjects the declarant to criminal liability and whether the declarant realized this when the statement was made. *Id.* at 890–91. Second, the trial court must determine whether sufficient corroborating circumstances exist that clearly indicate the trustworthiness of the statements. *Id.* at 891 (citing *Dewberry*, 4 S.W.3d at 751). Such corroboration includes consideration of the following factors: (1) whether the guilt of the declarant is inconsistent with the guilt of the defendant, (2) whether the declarant was so situated that she might have committed the crime, (3) the timing of the declaration prior to the offense, (4) the spontaneity of the declaration, (5) the relationship between the declarant and the party to whom the statement is made, and (6) the existence of independent corroborative facts. *Dewberry*, 4 S.W.3d at 751. When the statement is offered by the State to inculpate the defendant, the first two factors are not relevant. *Woods v. State*, 152 S.W.3d 105, 113 (Tex. Crim. App. 2004).

Texas Rule of Evidence 801(e)(2)(E)

The Rules of Evidence also provide that some out-of-court statements are not hearsay. *See* Tex. R. Evid. 801(e). For example, an out-of-court statement is not hearsay if it is made by a co-conspirator of the defendant during the course of and in furtherance of the conspiracy. Tex. R. Evid. 801(e)(2)(E). For this rule to apply, the State has the burden of showing that a conspiracy existed, that the co-conspirator was a member of or participated in the conspiracy, and that the statement was made to

advance or facilitate the conspiracy. *Guidry v. State,* 9 S.W.3d 133, 148 (Tex. Crim. App. 1999). Statements that are made in furtherance of a conspiracy include those made (1) with intent to induce another to deal with co-conspirators or in any other way to cooperate with or assist co-conspirators, (2) with intent to induce another to join the conspiracy, (3) in formulating future strategies of concealment to benefit the conspiracy, (4) with intent to induce continued involvement in the conspiracy, or (5) for the purpose of identifying the role of one conspirator to another. *See King v. State*, 189 S.W.3d 347, 360 (Tex. App.—Fort Worth 2006, no pet.); *Lee v. State*, 21 S.W.3d 532, 538 (Tex. App.—Tyler 2000, pet. ref'd). It is not necessary that the defendant was part of the conspiracy at the time the co-conspirator made her statement. *Ward v. State*, 657 S.W.2d 133, 136-37 (Tex. Crim. App. 1983). Additionally, each declaration of a co-conspirator is admissible against a defendant although it occurred outside the presence and hearing of the defendant. *See Callaway v. State*, 818 S.W.2d 816, 831 (Tex. App.—Amarillo 1991, pet. ref'd).

Standard of Review

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *Coble v. State*, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010). A reviewing court will uphold the trial court's decision unless it lies outside the zone of reasonable disagreement. *Salazar v. State*, 38 S.W.3d 141, 153–54 (Tex. Crim. App. 2001).

DELGADO'S STATEMENTS TO ESCOBAR, MARTINEZ, AND CORTES WERE ADMISSIBLE AS STATEMENTS AGAINST PENAL INTEREST

Delgado's statements attempting to recruit Escobar, Martinez, and Cortes to help her murder Dr. Hatcher fall within a hearsay exception as statements against her penal interest. In accordance with Rule 803(24), the nature of Delgado's statements tended to subject Delgado to criminal liability, such that she would not have made them unless she believed them to be true. Delgado undoubtedly knew, as would the "average reasonable person," that recruiting others to help her commit murder would expose her to criminal liability. *Walter*, 267 S.W.3d at 898.

The evidence at trial showed that Delgado's statements bore the necessary indicia of trustworthiness. Delgado made the incriminating declarations to Escobar, Martinez, and Cortes before she, Appellant, or Cortes ever became suspects in Dr. Hatcher's murder. Indeed, Delgado made her statements well in advance of the offense, as she was attempting to recruit someone to commit the murder. Delgado's statements were unprompted by Escobar, Martinez, and Cortes. The timing and spontaneity of the statements tend to establish their reliability. *See Woods*, 152 S.W.3d at 113. Also, the fact that Delgado made these statements to friends and family, as opposed to a third party, further indicates their trustworthiness. *See Walter*, 267 S.W.3d at 898 (observing that statements to friends, loved ones, or family members normally do not raise the same trustworthiness concerns as those made to third parties).

The State also presented independent corroborative facts that verified Delgado's statements to Escobar, Martinez, and Cortes in which she attempted to recruit them to murder Dr. Hatcher. Detective Barnes discovered during his investigation that Delgado had a motive to kill Dr. Hatcher because Dr. Hatcher was dating her ex-boyfriend, Ricky. Delgado hired Cortes and Appellant to murder Dr. Hatcher in exchange for payment, but only after Escobar, Martinez, and a few other friends refused her offers. All of these witnesses provided the same objective of why Delgado sought to hire them to kill Dr. Hatcher – because she was distraught about her breakup with Ricky and wanted to eliminate his new love interest. Jose Ortiz testified that, after he saw his vehicle on the news, he notified the police that he was the owner and put them in contact with Delgado, to whom he had loaned the vehicle on the day of the offense. Delgado implicated Cortes as being the driver, and Cortes subsequently told the police that Dr. Hatcher's murder resulted from a murder-for-hire scheme orchestrated by Delgado. During a subsequent search of Delgado's vehicle, the police found the bat that Delgado had suggested Escobar and Martinez use during the offense.

The foregoing corroborative facts, plus evidence demonstrating the other *Dewberry* factors, indicate that Delgado's statements to Escobar, Martinez, and Cortes were trustworthy and therefore admissible under Rule 803(24). Accordingly, the trial

court did not abuse its discretion by overruling Appellant's hearsay objections and admitting the statements.

DELGADO'S STATEMENTS TO CORTES WERE ALSO ADMISSIBLE AS STATEMENTS OF A CO-CONSPIRATOR

Additionally, Delgado's statements to Cortes were admissible pursuant to Texas Rule of Evidence 801(e)(2)(E) as statements of a co-conspirator.

The evidence presented at trial showed that Delgado and Cortes entered into a conspiracy to murder Dr. Hatcher and then recruited Appellant to participate in the conspiracy as the shooter. Delgado's initial statements to Cortes about her hatred for Dr. Hatcher and wanting to "do away" with Dr. Hatcher were made with the intent to induce Cortes to help her murder Dr. Hatcher and were therefore made in furtherance of the conspiracy. *See King*, 189 S.W.3d at 360 (holding that statements made in furtherance of a conspiracy include those made with intent to induce another to join or continue with the conspiracy). The complained-of conversation between Cortes and Delgado is the very basis of the conspiracy and what led to the conspiracy moving forward. As such, the trial court did not abuse its discretion by admitting Delgado's statements to Cortes pursuant to Rule 801(e)(2)(E).

In light of the foregoing, Issues 26-28 are without merit and should be overruled.

RESPONSE TO ISSUES 29-30

The trial court properly overruled Appellant's motion to suppress.

At a pretrial suppression hearing, Appellant raised the following two complaints: (1) the search and seizure of his vehicle at the time of his arrest was unlawful, and (2) the subsequent search of his vehicle at the police auto pound pursuant to a warrant was unlawful because the warrant did not state probable cause. (36 RR 12-13, 59-62). In Issues 29 and 30, Appellant argues that the trial court erred by denying his motion to suppress on these grounds. (Appellant's Br. at 123-31). His claims are without merit and should be overruled.

FACTUAL BACKGROUND

The evidence presented at the suppression hearing showed that Dallas Police Detective Eric Barnes was the lead detective assigned to investigate the capital murder of Kendra Hatcher. (36 RR 27-28). Throughout the course of his investigation, Detective Barnes was regularly assisted by other members of the Dallas Police Department's Homicide Unit. (36 RR 28). Detective Barnes personally conducted interviews with Crystal Cortes on the following dates: September 4, 2015; September 9, 2015; September 10, 2015; September 29, 2015; and October 1, 2015. (36 RR 28-29). During her interviews, Cortes admitted that she was paid $500 by Brenda Delgado to drive an unknown black male to Dr. Hatcher's apartment complex, where the unknown black male shot Dr. Hatcher and took several items of her property.

(State's Pretrial Exhibit ("SPE") 1). Cortes was in custody for her role as the driver in the capital murder, but the shooter was still at large. (36 RR 32). The police had not yet recovered all of the property stolen from Dr. Hatcher or the murder weapon used. (36 RR 34). They also had not located the hoodie and gloves worn by the shooter during the offense, which they believed could contain blood spatter or DNA evidence relevant to the offense. (36 RR 41). The police believed that any of these items could be in the possession of the shooter. (36 RR 34, 41).

Cortes was not initially forthcoming about the identity of the shooter, and it took Detective Barnes several interviews to get details about the shooter from her. (36 RR 32). Cortes stated that the shooter drove a blue Chrysler Sebring with a black top and out-of-state plates that she thought were from Tennessee. (36 RR 29, 37). She provided several names for the shooter, one of which was "Kris." (36 RR 30). She stated that, during the planning of the offense, she and Delgado rode with the shooter in his Sebring to conduct surveillance of the victim. (36 RR 30-32). Cortes also stated that the shooter kept the gun after the murder. (36 RR 34).

In addition to interviewing Cortes, law enforcement used the cell phone records of several individuals suspected to have been involved in the offense to identify a common number they believed belonged to the shooter. (36 RR 32-33). Cortes confirmed that the number identified belonged to the shooter. (36 RR 33-34). Detective Barnes then obtained a ping order to ascertain the location of the phone

associated with that number. (36 RR 33). On October 1, 2015, while Detective Barnes was interviewing Cortes, Detective James Thompson and Agent Jason Ibrahim with the Federal Bureau of Investigation ("FBI") executed the ping order. (36 RR 35).

The ping took them to an apartment complex located at 7310 Marvin D. Love Freeway in Dallas. (36 RR 35; SPE 2). Agent Ibrahim located a blue Chrysler Sebring with a black top bearing Tennessee license plate J65-10X in the parking lot of the apartment complex. (36 RR 35-36; SPE 2). The Sebring was registered to Merika Swint, the mother of Appellant's children, and Janice Johnson, her mother. (36 RR 36; SPE 2). Agent Ibrahim learned from an individual in the leasing office that the Sebring was associated apartment number 928, which was leased to Janice Johnson. (36 RR 35-36; SPE 2). The officers maintained surveillance on the vehicle and, a short time later, they observed a skinny black male descend the stairwell closest to apartment 928 and enter the Sebring. (36 RR 36-37; SPE 2). As the individual drove the Sebring out of the parking lot, the ping moved simultaneously with the vehicle, indicating that the phone they were pinging was in the possession of the driver. (36 RR 37-38, 49-50). The Sebring went a short distance to another apartment complex located at 7345 Chaucer Place, and the ping moved to that location along with the Sebring. (36 RR 37-38; SPE 2). The officers maintained constant surveillance on the Sebring. (SPE 2). As the driver of the Sebring was standing outside the vehicle speaking with two other individuals at the second apartment complex, the officers

approached. (36 RR 38; SPE 2). The driver was identified as Appellant, and the other two individuals were identified as Kelly Ellis and Katrina Covin. (36 RR 42, 45; SPE 2). The officers observed a cell phone sitting on the trunk of the Sebring, and when Detective Barnes called the number of the phone they were pinging, the phone on the trunk rang. (36 RR 38-39). At that point, all three individuals were arrested for outstanding warrants for other offenses. (36 RR 39, 45).

The officers did a cursory search of the Sebring when Appellant was placed under arrest but did not seize any items. (36 RR 40, 41-42). They observed that there were a lot of items inside the vehicle, and it would have taken a significant amount of time to conduct a proper inventory and search. (36 RR 40). Additionally, the apartment complex where the Sebring was located was in a high-crime area. (36 RR 40). The officers decided to tow the vehicle to the police auto pound so that it could be searched at a later time. (36 RR 41). After the vehicle was towed, and in an abundance of caution, Detective Barnes drafted an affidavit and warrant to search the vehicle. (36 RR 41). Colleen Shinn, another detective in the homicide unit who had been assisting in the capital murder investigation, swore to the facts and allegations contained in the probable cause affidavit. (36 RR 20; SPE 1). The warrant was presented to and signed by Judge Dominique Collins in Criminal District Court No. 4 of Dallas County. (36 RR 20; SPE 1).

After hearing this testimony and argument from the parties, the trial court denied Appellant's motion to suppress. (36 RR 62).

STANDARD OF REVIEW

Appellate courts review a trial court's ruling on a motion to suppress for abuse of discretion, using a bifurcated standard. *Guzman v. State*, 955 S.W.2d 85, 88–89 (Tex. Crim. App. 1997). Generally, the trial court's findings of historical fact supported by the record, as well as mixed questions of law and fact that turn on an evaluation of credibility and demeanor, are given "almost total deference." *Id.* at 89. A *de novo* standard is applied to a trial court's determination of the law and its application of the law to the facts when that application does not turn on an evaluation of credibility and demeanor. *Id.* A trial court's ruling on a motion to suppress will be upheld if the ruling is reasonably supported by the record and correct under any theory of law applicable to the case. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006).

WARRANTLESS SEARCH OF APPELLANT'S VEHICLE AT TIME OF ARREST

In Issue 29, Appellant complains about the warrantless search and seizure of his vehicle at the time of his arrest. Appellant appears to argue that no exigent circumstances existed to justify the warrantless search. (Appellant's Br. at 123, 129).

Applicable Law

The Fourth Amendment forbids unreasonable searches and seizures by government officials. U.S. Const. amend. IV; *Wiede v. State*, 214 S.W.3d 17, 24 (Tex.

Crim. App. 2007). Generally, a search conducted without a warrant is considered *per se* unreasonable. *Wiede*, 214 S.W.3d at 24 (citing *Maryland v. Dyson*, 527 U.S. 465, 466 (1999). However, there is an exception for vehicles—a warrantless search of a vehicle is reasonable if law enforcement officials have probable cause to believe the vehicle contains evidence of a crime. *Id.* (citing *Dyson*, 527 U.S. at 466-67). The two justifications for the automobile exception are the automobile's ready mobility and the lower expectation of privacy in an automobile in contrast to a home or office. *See Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996); *California v. Carney*, 471 U.S. 386, 393 (1985); *Keehn v. State*, 279 S.W.3d 330, 335 (Tex. Crim. App. 2009). Exigent circumstances are not a requirement of the automobile exception. *Neal v. State*, 256 S.W.3d 264, 283 (Tex. Crim. App. 2008) (citing *Dyson*, 527 U.S. at 467).

Probable cause to search exists when, under the totality of the circumstances, there is a "fair probability" that contraband or evidence of a crime will be found at the specified location. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983); *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007). The sum of the information known to the cooperating agencies or officers at the time of an arrest or search by any of the officers involved is to be considered in determining whether there was sufficient probable cause. *State v. Martinez*, 569 S.W.3d 621, 626 (Tex. Crim. App. 2019); *Woodward v. State*, 668 S.W.2d 337, 344 (Tex. Crim. App. 1982) (op. on reh'g); *see also Illinois v. Andreas*, 463 U.S. 765, 771–72 n.5 (1983) ("[W]here law enforcement

authorities are cooperating in an investigation, ... the knowledge of one is presumed shared by all.").

The Police Had Probable Cause to Conduct a Warrantless Search of Appellant's Vehicle Under the Automobile Exception

The evidence presented at the suppression hearing showed that, based on the collective knowledge of all the officers at the time of Appellant's arrest, the police were justified in conducting a warrantless search of Appellant's vehicle because they had probable cause to believe the vehicle contained evidence of a crime. Appellant's cell phone number was identified as a common number among the various suspects being investigated in connection with the instant capital murder. After the number was identified, Cortes confirmed Appellant's number as belonging to the shooter. A ping of the phone took the officers to an apartment complex in Dallas, where they observed a vehicle matching the description of the shooter's vehicle given by Cortes, specifically, a blue Chrysler Sebring with a black convertible top and Tennessee plates. The officers observed Appellant exit a nearby apartment and get into the Sebring. He drove out of the parking lot, and the officers followed. As Appellant drove, the ping moved simultaneously with the Sebring, indicating that Appellant was in possession of the cell phone they were pinging. No one else was in the vehicle with Appellant at this time. Appellant drove to a nearby apartment complex, where he met up with two other individuals. All three individuals were standing and talking outside the Sebring when the officers approached and asked for identification. The officers observed a

cell phone sitting on the trunk of the Sebring. Per a request from the officers at the scene, Detective Barnes called the number they were pinging, and the cell phone sitting on the trunk rang. Appellant and the others were arrested at that time for outstanding warrants.

This evidence showed that the police had reason to believe that Appellant was the shooter and that his vehicle contained evidence of the crime. Appellant was in possession of the phone identified as belonging to the shooter, initially at the apartment and then in the vehicle, as confirmed by the officers' observation of the ping moving along with Appellant's movements. Appellant was also driving the vehicle identified as belonging to the shooter that had been used as an instrumentality in the offense (i.e., surveillance of the victim prior to the murder). Based on statements from Cortes, the police believed that Appellant was still in possession of the murder weapon. Additionally, the police had reason to believe that Appellant's vehicle could contain other items relevant to the offense, such as the victim's property that Appellant stole, the gloves and hoodie Appellant wore during the murder, and/or other forensic evidence. Under the totality of the circumstances, there was a "fair probability" that contraband or evidence of the crime would be found in Appellant's vehicle. As such, the police had probable cause to search the vehicle. Under the automobile exception, they did not need a warrant or exigent circumstances. *See Neal*, 256 S.W.3d at 283; *Wiede*, 214 S.W.3d at 24.

The evidence showed that the officers did a cursory search of the vehicle at the scene but did not seize any items. The vehicle contained a large number of items and would have taken a considerable amount of time to search. The vehicle was parked in a high-crime area, so the officers thought it would be best to tow the vehicle to the police auto pound so that it could be safely searched there. This was entirely permissible, as there is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure if there is probable cause to believe that the vehicle contains evidence of a crime. *United States v. Johns*, 469 U.S. 478, 484 (1985). Police officers with probable cause to search an automobile at the scene may constitutionally do so later at the police station because the probable cause factor that developed at the scene still exists at the police station. *Texas v. White*, 423 U.S. 67, 68 (1975); *Chambers v. Maroney*, 399 U.S. 42, 52 (1970); *see also, e.g., Gandy v. State*, 835 S.W.2d 238, 243 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (holding that because there was probable cause to search the defendant's car at the time of his arrest, it was proper to impound the car and search it later at the police station).

In conclusion, the officers had probable cause at the time of Appellant's arrest to conduct a warrantless search of Appellant's vehicle based on the automobile exception, and no exigent circumstances were required. *See Neal*, 256 S.W.3d at 283; *Wiede*, 214 S.W.3d at 24. Additionally, there was no requirement that the warrantless search of Appellant's vehicle occur contemporaneously with its lawful seizure; the

probable cause that existed at the time of arrest still existed later at the police station. *See Johns*, 469 U.S. at 484; *White*, 423 U.S. at 68. Appellant has not shown that the search or seizure of his vehicle at the time of his arrest was unlawful, and he therefore has not shown that the trial court erred by denying his motion to suppress on this basis. Issue 29 should be overruled.

SEARCH OF APPELLANT'S VEHICLE PURSUANT TO A WARRANT

In Issue 30, Appellant complains about the subsequent search of his vehicle that was performed at the auto pound pursuant to a warrant. He argues that the initial seizure was illegal, making anything subsequently discovered a fruit of that illegal seizure, and that the warrant failed to state probable cause. (Appellant's Br. at 130-31).

As previously discussed, there is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure if there is probable cause to believe that the vehicle contains evidence of a crime. *Johns*, 469 U.S. at 484. Because the police had probable cause to conduct a warrantless search of Appellant's vehicle at the time of his arrest, they could constitutionally do so later at the police auto pound without first obtaining a warrant. *White*, 423 U.S. at 68; *Chambers*, 399 U.S. at 52. Because the initial seizure and a subsequent search were proper without a warrant, there is no need to examine Appellant's complaint about the search warrant.

Alternatively, the record supports the trial court's rejection of Appellant's claim that the search warrant failed to establish probable cause.

Applicable Law

A magistrate may not issue a search warrant without first finding "probable cause" that a particular item will be found in a particular location. *See State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012); *Rodriguez*, 232 S.W.3d at 60; U.S. Const. amend IV; Tex. Const. art. I, § 9. The test is whether a reasonable reading by the magistrate would lead to the conclusion that the four corners of the affidavit provide a "substantial basis" for issuing the warrant. *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984); *Duarte*, 389 S.W.3d at 354; *Rodriguez*, 232 S.W.3d at 60. As previously discussed, probable cause exists when, under the totality of the circumstances, there is a "fair probability" that contraband or evidence of a crime will be found at the specified location. *Gates*, 462 U.S. at 238; *Duarte*, 389 S.W.3d at 354; *Rodriguez*, 232 S.W.3d at 60. This is a flexible, nondemanding standard. *Duarte*, 389 S.W.3d at 354. Neither federal nor Texas law defines precisely what degree of probability suffices to establish probable cause. *Gates*, 462 U.S. at 239; *Duarte*, 389 S.W.3d at 354; *Rodriguez*, 232 S.W.3d at 61.

When reviewing a magistrate's decision to issue a warrant, trial and appellate courts apply a highly deferential standard in keeping with the constitutional preference for a warrant. *Rodriguez*, 232 S.W.3d at 61. Thus, when an appellate court reviews an issuing magistrate's determination, that court should interpret the affidavit in a commonsensical and realistic manner, recognizing that the magistrate may draw

reasonable inferences. *Id.* When in doubt, an appellate court defers to all reasonable inferences that the magistrate could have made. *Id.* A reviewing court must uphold the magistrate's decision so long as the magistrate had a substantial basis for concluding that probable cause existed. *Duarte*, 389 S.W.3d at 354 (citing *Gates*, 462 U.S. at 236, 241). The focus is not on what other facts could or should have been included in the affidavit; the focus is on the combined logical force of facts that are in the affidavit. *Id.* at 354-55 (citing *Rodriguez*, 232 S.W.3d at 62).

The Search Warrant Was Supported by Probable Cause

The facts and inferences contained in the affidavit in this case were sufficient to establish probable cause to search Appellant's vehicle. The affidavit indicated that Cortes confessed to police that she was paid $500 by Brenda Delgado to drive an unknown black male to Dr. Hatcher's apartment complex, where the unknown black male shot Dr. Hatcher and took several items of her property. (SPE 1). Cortes's statements were corroborated through witness statements as well as surveillance video footage from the offense location. (SPE 1). The affidavit stated that Cortes told the police that the unknown black male shooter drove a blue Chrysler Sebring with Tennessee plates. (SPE 1). Investigation of cell phone records and pinging of a phone number directly linked to the shooter and the murder of Dr. Hatcher led Dallas Police to a location in Dallas where the named vehicle, a 2008 Chrysler Sebring with Tennessee plate J65-10X, was found. (SPE 1). Police were able to confirm that the

phone being pinged was inside the vehicle. (SPE 1). The affidavit stated that the affiant believed that the issuance of the warrant and the search could yield further evidence related to the case. (SPE 1).

Appellant does not identify any factual inaccuracies in the affidavit. As the testimony demonstrated, the officers were able to determine that the phone they were pinging was in Appellant's possession once he was inside the vehicle, the vehicle started moving, and the ping moved simultaneously with the vehicle.

To the extent that Appellant is complaining about the fact that Detective Shinn did not have personal knowledge about many of the facts contained in the affidavit, that did not render it insufficient. At the beginning of the affidavit, Shinn specifically states that she was assisting lead Detective Eric Barnes in the ongoing murder investigation, and that all details and information related to the investigation were gained by working in conjunction with Detective Barnes. (SPE 1). When making a probable cause determination, a magistrate judge may rely upon a police officer's affidavit based either on that officer's knowledge or on knowledge gathered from other officers. *See United States v. Ventresca*, 380 U.S. 102, 111 (1965); *Johnson v. State*, 803 S.W.2d 272, 289 (Tex. Crim. App. 1990) (*disapproved in part by Heitman v. State*, 815 S.W.2d 681, 685 n.6 (Tex. Crim. App. 1991)).

The facts that were in the affidavit, combined with all reasonable inferences that might flow from those facts, were sufficient to establish a "fair probability" that

evidence of the crime would be found in Appellant's vehicle. As such, the warrant was supported by probable cause, and the trial court did not err by denying Appellant's motion to suppress on this basis. Issue 30 should be overruled.

RESPONSE TO ISSUES 31-32

The trial court did not abuse its discretion by overruling Appellant's objections to victim-impact and victim-character evidence during the punishment phase of trial.

In Issues 31 and 32, Appellant contends that the trial court erred by overruling his objections to victim-impact testimony offered in rebuttal by Bonnie Jameson, Dr. Hatcher's mother, and to the admission of 15 victim-character photographs offered through the testimony of Ashley Turner, Dr. Hatcher's sister. (Appellant's Br. at 131, 136). Appellant acknowledges that victim-impact and victim-character evidence is permissible in a death penalty case. He argues, however, that the State's victim-impact and victim-character evidence, in total, was so voluminous that it became prejudicial and violated his right to due process and a fair trial. (Appellant's Br. at 134-35, 139). His contentions are meritless.

APPLICABLE LAW

There is no constitutional impediment to the consideration of victim-impact and victim-character evidence. *See Williams v. State*, 273 S.W.3d 200, 225 (Tex. Crim. App. 2008). Giving the defendant the broadest latitude to introduce relevant mitigating evidence justly entails permitting the prosecutor to introduce the human

costs of the crime of which the defendant stands convicted. *Id.* at 218-19 (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Victim-character evidence is designed to give the jury a quick glimpse of the life that the defendant chose to extinguish and to remind the jury that the person whose life was taken was a unique human being. *Salazar v. State*, 90 S.W.3d 330, 335 (Tex. Crim. App. 2002). Victim-impact evidence is designed to remind the jury that murder has foreseeable consequences to the community and the victim's survivors—family members and friends who also suffer harm from murderous conduct. *Id.* Both victim-impact and victim-character evidence are admissible in the context of the mitigation special issue to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence. *Mosley v. State*, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998).

This rule of admissibility is subject to limitation under Rule 403 of the Texas Rules of Evidence. *Id.* at 262. Trial judges should exercise their sound discretion in permitting some evidence about the victim's character and the impact on others' lives while limiting the amount and scope of such testimony. *Id.* at 262–63. Victim-impact and victim-character evidence may become unfairly prejudicial through "sheer volume." *Id.* at 263.

There is no bright-line standard for determining when victim-impact and victim-character evidence is admissible. *Id.* at 262. Such decisions are within the trial court's sound discretion, and a trial court's ruling will not be disturbed on appeal

unless it falls outside the zone of reasonable disagreement. *Hayden v. State*, 296 S.W.3d 549, 553 (Tex. Crim. App. 2009).

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE VICTIM-IMPACT TESTIMONY OF BONNIE JAMESON

During its punishment case-in-chief, the State presented victim-impact testimony from two witnesses: Ashley Turner, Dr. Hatcher's sister, and Tammy Pantano, Dr. Hatcher's best friend from dental school. (41 RR 102-26). Appellant did not object to the testimony of either of these witnesses. Turner described Dr. Hatcher's life growing up, her many accomplishments and acts of service, her love for children, and how she strived for excellence in everything she did. (41 RR 102-120). Turner also described the impact Dr. Hatcher's murder had on her and her extended family. (41 RR 119-20). Pantano described how she and Dr. Hatcher met, Dr. Hatcher's skills as a dentist, and how Dr. Hatcher's murder has impacted her life and the lives of many others in the community. (41 RR 120-26).

After the defense indicated to the court that it was planning to rest its case in punishment, the State sought to introduce victim-impact testimony from Jameson, Dr. Hatcher's mother, in rebuttal of Appellant's mitigation. (43 RR 6, 9-10). Appellant objected to the admission of the testimony on the basis that it was improper rebuttal and was offered to inflame the passion of the jurors and take their focus away from the special issues. (43 RR 6-9). The court ruled that it would allow the testimony for the limited purpose of rebuttal of mitigation but that it would not allow the witness to

go into anything that already been testified to by previous witnesses. (43 RR 10, 11). In accordance with the trial court's ruling, Jameson testified solely about the impact her daughter's death has had on her life. (43 RR 12-13).

On appeal, Appellant argues that the State's victim-impact evidence was "so voluminous" that it violated his right to due process and a fair trial. (Appellant's Br. at 135). However, Jameson's testimony was very brief and occupies only two pages of the punishment-phase record. (43 RR 12-13). Appellant offers no other argument as to why her testimony was improper or inadmissible. To the extent that Appellant's argument includes the testimony of Turner and Pantano, no objection was made to their testimony at trial and therefore nothing is preserved for appellate review. *See* Tex. R. App. P. 33.1(a). Nonetheless, even if their testimony was considered along with Jameson's, the total victim-impact testimony offered by the State occupies only 23 pages of the punishment-phase record, which contains over 500 pages. Again, this is far from voluminous. *See, e.g., Williams v. State*, 176 S.W.3d 476, 483 (Tex. App.—Houston [1st Dist] 2004, no pet.) (holding that victim-impact testimony was not lengthy and was therefore not prejudicial based on its volume).

It is clear from the record that the trial court admitted Jameson's victim-impact testimony for a proper purpose, rebuttal of Appellant's mitigation evidence, and placed appropriate limits on the testimony. *See Mosley*, 983 S.W.2d at 262-63. As such, the trial court did not abuse its discretion in admitting Jameson's testimony. *See, e.g.,*

Estrada v. State, 313 S.W.3d 274, 316 (Tex. Crim. App. 2010) (holding that the trial court did not abuse its discretion by admitting victim-impact testimony from the victim's mother and father where the testimony was admitted for a proper purpose and the trial court placed appropriate limits upon the amount, kind, and source of the victim-impact evidence). Issue 31 should be overruled.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE VICTIM-CHARACTER PHOTOGRAPHS

Outside the presence of the jury during the punishment phase of trial, the State tendered to the defense and the trial court 19 photographs that it intended to offer as victim-character evidence. (41 RR 59; SE 363-381). The court did an in-camera inspection of the photographs and ruled that 15 of the 19 photographs were admissible. (41 RR 59-61; SE 363-374, 376-377, 380). Appellant objected to the 15 photographs on the basis that they were duplicitous of the oral testimony already before the jury and were being offered to inflame the jury and take their focus away from the statutory special issues. (41 RR 60-61, 112). Appellant's objection was overruled. (41 RR 63, 112). The 15 victim-character photographs were then admitted during the testimony of Dr. Hatcher's sister, Ashley Turner. The photographs depicted Dr. Hatcher with her siblings, nieces, and nephews, all of whom she was close to, and depicted some of Dr. Hatcher's accomplishments and acts of service. (41 RR 112-17).

As previously discussed herein, victim-character evidence is relevant and admissible to show the uniqueness of the victim and the harm caused by the defendant. *Mosley*, 983 S.W.2d at 262. Part of showing a victim's uniqueness is to humanize the victim for the jury. *Solomon*, 49 S.W.3d at 366. Additionally, some humanizing of the victim's family members accomplishes that purpose by impressing upon the jury that real people were in fact harmed by the victim's death. *Id.* Here, the testimony and photographs illustrating Dr. Hatcher's childhood, accomplishments, and contributions to the community humanized Dr. Hatcher for the jury and illustrated her uniqueness. The photographs of Dr. Hatcher with her siblings, nieces, and nephews humanized the family members that were harmed by her death. The number of photographs was limited by the trial court and admitted for this proper purpose.

On appeal, Appellant argues that the admission of the photographs in this case became unfairly prejudicial under Texas Rule of Evidence 403 through "sheer volume." (Appellant's Br. at 139). However, the discussion and admission of the 15 photographs occupies only about five pages of the punishment-phase record. (41 RR 112-17). This is hardly voluminous given the length of the punishment phase and the total number of exhibits admitted. *See, e.g., Williams*, 176 S.W.3d at 483; *see also Mays*, 318 S.W.3d at 393 (holding that "sheer volume" was not a factor where victim-related evidence took up only a brief portion of the punishment record).

Appellant has not shown that the photographs were unduly prejudicial due to sheer volume or any other relevant factor. When considering the admissibility of victim-character evidence under Rule 403, courts consider the following factors: (1) how probative is the evidence; (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way; (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence. *Salazar*, 90 S.W.3d at 336; *Solomon*, 49 S.W.3d at 366. The rules of evidence favor the admission of relevant evidence and carry a presumption that relevant evidence is more probative than prejudicial. *Jones v. State*, 944 S.W.2d 642, 652 (Tex. Crim. App. 1996).

Here, the victim-character photographs were offered in the context of the mitigation special issue to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence. Thus, they were highly probative to the special issues before the jury. With regard to the second factor—the potential of the evidence to impress the jury in some irrational and indelible way—courts look to whether the evidence tended to encourage the jury to engage in "measuring the worth of the victim compared to other members of society." *Mosley*, 983 S.W.2d at 262. Although the evidence at issue emphasized that Dr. Hatcher was a good person and had a lot of good qualities, the evidence did not encourage the jury to engage in a "worth" comparison. The time taken to develop the evidence was minimal. Finally, the State had some need for the testimony. Dr.

Hatcher had a large extended family, and many family members were unable to travel to Dallas for the trial. The photographs were the only exposure the jury had to these close members of her family.

Considering the relevant factors, the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. As such, the trial court did not abuse its discretion by admitting the 15 victim-character photographs. Issue 32 should be overruled.

RESPONSE TO ISSUE 33

The trial court did not abuse its discretion by overruling Appellant's objections to State's Exhibits 176 and 178 during the punishment phase of trial.

In Issue 33, Appellant contends that the trial court erred by overruling his objections to State's Exhibits 176 and 178, photographs of Appellant. He argues that the exhibits should have been excluded under Texas Rule of Evidence 403 because the photographs had no probative value, each one was highly prejudicial, and one photograph was duplicitous of the other. (Appellant's Br. at 139, 142).

FACTUAL BACKGROUND

Outside the presence of the jury, the State tendered to the defense and the trial court three photographs that it intended to offer into evidence during the punishment phase of trial: State's Exhibits 176, 178, and 180. (41 RR 62-63; SE 176, 178, 180). After conducting an in-camera inspection of the photographs, the trial court admitted

State's Exhibits 176 and 178 but excluded State's Exhibit 180. (41 RR 63). Appellant objected to State's Exhibit 178 on the basis that it had no probative value to any of the issues before the jury and that anything depicted in the photograph was prejudicial. (41 RR 62-63). Appellant also indicated that State's Exhibit 176 could accomplish the same goal as State's Exhibit 178—"to bring forth a depiction of the Defendant with a…grimace upon his face"—and that, if the State was going to offer both exhibits, he would also object to them as being duplicitous. (41 RR 63). His objections were overruled. (41 RR 63).

State's Exhibits 176 and 178 were offered into evidence through the punishment-phase testimony of Detective Barnes. (41 RR 71, 91). Detective Barnes explained that the images were discovered on Appellant's cell phone when they conducted the phone dump. (41 RR 71). The record reflects that State's Exhibit 176 is a picture that Appellant took of himself showing his face and various chest tattoos, and State's Exhibit 178 is a close-up picture of Appellant making a grimacing face. (SE 176, 178).

APPLICABLE LAW

Texas Rule of Evidence 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. Rule 403

favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Jones*, 944 S.W.2d at 652. The trial court's ruling on a Rule 403 objection is reviewed under an abuse-of-discretion standard and is disturbed on appeal only when the ruling falls outside the zone of reasonable disagreement. *Id.* at 651.

An analysis under Rule 403 includes, but is not limited to, the following factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Erazo v. State*, 144 S.W.3d 487, 489 (Tex. Crim. App. 2004). In the context of the admission of photographs, courts also consider the number of photographs offered, their gruesomeness, their detail, their size, whether they are in color or black and white, whether they are close up, whether the body depicted is clothed or naked, the availability of other means of proof, and other circumstances unique to the individual case. *Santellan v. State*, 939 S.W.2d 155, 172 (Tex. Crim. App. 1997).

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE PHOTOGRAPHS

During the punishment phase, Appellant's character was at issue by virtue of the special issues before the jury. *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2(a) (during the punishment phase of a capital murder trial, evidence may be presented by the state and the defendant as to any matter that the court deems relevant to sentence,

including evidence of the defendant's character); *Keeton v. State*, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987) (noting that the jury may consider character evidence, among other things, when determining whether the defendant will pose a continuing threat to society). The fact that Appellant had such pictures of himself saved on his phone was probative of his character and the self-image that he wanted to portray to others. The State also had a need for such evidence of Appellant's character, as shown by his own pictures, to rebut character evidence presented by the defense.

Appellant complains of only two photographs out of 67 admitted during the punishment phase, a small number given the size of the record and the total number of exhibits admitted. The record reflects that the photographs are black and white and smaller than many of the other photographs admitted during trial because they do not occupy the entire 8.5" x 11" page.[23] They were not gruesome or detailed, and they do not appear to be enhanced in any way. The State did not place undue weight on the photographs or encourage the jury to make a decision on an emotional basis. Thus, the potential for the photographs to impress the jury in an irrational way was low. Additionally, the State spent very little time offering the photographs into evidence. (41 RR 91).

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[23] The record contains black-and-white photocopies of the photographs. The record is silent as to whether the photographs shown to the jury were in color or were a different size.

Appellant characterizes the photographs as duplicitous because they both show Appellant with a grimace on his face. However, the record reflects that Exhibit 178 only shows Appellant's face, whereas Exhibit 176 contains other relevant information because it captures many of the tattoos that Appellant had on his chest. Although both photographs show Appellant making what he describes as a "grimacing" face, his expression in each photograph is different. As such, the admission of both photographs was not duplicitous or a needless presentation of cumulative evidence.

Considering all relevant factors, the probative value of the photographs was not substantially outweighed by their prejudicial effect or the needless presentation of cumulative evidence. Accordingly, the trial court did not abuse its discretion in admitting State's Exhibits 176 and 178. Issue 33 should be overruled.

RESPONSE TO ISSUE 34

The evidence is legally sufficient to support the jury's finding of future dangerousness.

In Issue 34, Appellant challenges the legal sufficiency of the evidence to support the jury's affirmative answer to the future-dangerousness special issue. He argues that the evidence was insufficient because he had no prior violent offense convictions and many witnesses testified that he essentially was a low risk for future dangerousness while incarcerated. (Appellant's Br. at 142-46).

When reviewing the sufficiency of the evidence supporting the jury's future-dangerousness determination, this Court views the evidence in the light most favorable to the verdict to determine whether, based on that evidence and reasonable inferences therefrom, any rational trier of fact could have found beyond a reasonable doubt that there is a probability that Appellant would commit criminal acts of violence constituting a continuing threat to society. *Martinez v. State*, 327 S.W.3d 727, 730 (Tex. Crim. App. 2010).

In its determination of the special issues, the jury is entitled to consider all of the evidence presented at both the guilt and punishment stages of trial. Tex. Code Crim. Proc. Ann. art. 37.071, § 2(d)(1); *see also Young v. State*, 283 S.W.3d 854, 863 (Tex. Crim. App. 2009). Some factors the jury may consider when determining whether a defendant will pose a continuing threat to society include: (1) the circumstances of the offense, including the defendant's state of mind and whether he was working alone or with other parties; (2) the calculated nature of his acts; (3) the forethought and deliberateness exhibited by the crime's execution; (4) the existence of a prior criminal record and the severity of the prior crimes; (5) the defendant's age and personal circumstances at the time of the offense; (6) whether the defendant was acting under duress or the domination of another at the time of the offense; (7) psychiatric evidence; and (8) character evidence. *See Wardrip v. State*, 56 S.W.3d 588, 594 (Tex. Crim. App. 2001); *Keeton*, 724 S.W.2d at 61. The facts of the offense alone

may be sufficient to sustain the jury's finding of future dangerousness. *Martinez*, 327 S.W.3d at 730; *Fuller v. State*, 253 S.W.3d 220, 231–32 (Tex. Crim. App. 2008).

The evidence presented at trial showed that Kendra Hatcher's murder was a hit designed to look like a robbery gone bad. Dr. Hatcher was dating Brenda Delgado's former boyfriend, Dr. Ricardo Paniagua, and the relationship between Dr. Hatcher and Dr. Paniagua was quickly progressing toward marriage. Delgado, a scorned and jealous ex-lover, wanted to eliminate Dr. Paniagua's new love interest so that she and Dr. Paniagua could be together again. Delgado attempted, unsuccessfully, to recruit several different friends and family members to help her kill Dr. Hatcher. The first day that Delgado met Appellant, however, he agreed to murder Dr. Hatcher in exchange for drugs and money. Over the next week, Appellant assisted Delgado and Cortes in planning every detail of Dr. Hatcher's murder. They knew where Dr. Hatcher lived and worked, and they watched and followed her daily to determine the best time to commit the murder. Appellant suggested that they shoot Dr. Hatcher with a gun because it would be the quickest and easiest way to kill her. He volunteered to be the shooter and obtained the gun used during the murder. The day of the offense, Appellant followed through with their plan without hesitation and, despite Dr. Hatcher's screams and pleas for mercy, he executed her by putting a bullet in the back of her head.

These facts showed that Appellant committed capital murder with premeditation, calculation, and forethought. *See Sonnier v. State*, 913 S.W.2d 511, 517 (Tex. Crim. App. 1995) (holding that evidence of a murder committed with calculation, deliberation, or premeditation is evidence of future dangerousness). The fact that Appellant agreed to murder an innocent woman he had never met in exchange for a small amount of drugs and money demonstrated a general disregard for human life. *See Ford v. State*, 919 S.W.2d 107, 112 (Tex. Crim. App. 1996) (holding that disregard for human life is evidence of future dangerousness). The cold-blooded and calculated nature of this offense, alone, was sufficient to support the jury's finding of future dangerousness. *See Gardner*, 306 S.W.3d at 304 ("[T]his Court has repeatedly said that, if the circumstances of the case are sufficiently cold-blooded or calculated, then those facts alone may support a finding of future dangerousness.").

After Appellant was identified as potentially being involved in the offense, he was brought in for questioning. Throughout his interview with Detective Barnes, Appellant showed a total lack of emotion or sympathy and was more concerned about a basketball game than the fact that someone had been killed. After the murder weapon was discovered in his vehicle, Appellant eventually admitted to participating in the offense but minimized his role and tried to shift the blame to his accomplice, Cortes. Appellant claimed the offense was supposed to be a robbery and that he was struggling with Dr. Hatcher over her property when Cortes backed up the vehicle and

shot her. Appellant's lack of remorse and his deflection of blame support the jury's finding of future dangerousness. *See Estrada*, 313 S.W.3d at 284-85 (citing *Trevino v. State*, 991 S.W.2d 849, 854 (Tex. Crim. App. 1999)) (holding that a jury may infer future dangerousness from evidence showing a lack of remorse).

The evidence admitted during the punishment phase of trial showed that Appellant had a long history of criminal activity, which began when he was a juvenile and continued up to the time of the instant capital murder. While living in Tennessee, Appellant committed numerous criminal offenses, including theft, reckless endangerment, reckless driving, leaving the scene of an accident, evading arrest, unlawful possession of a weapon, burglary of a habitation, aggravated assault, and aggravated robbery. Appellant was sentenced to eight years' imprisonment for the last aggravated robbery he committed. Appellant's lengthy criminal history also supports the jury's finding of future dangerousness. *See, e.g., Buntion v. State*, 482 S.W.3d 58, 67 (Tex. Crim. App. 2016) (holding that the defendant's prior criminal record supported the jury's finding that he posed a continuing threat to society).

Appellant's family members testified that they always supported Appellant, visited him when he was incarcerated, and counseled and encouraged him to get back on the right path. Nonetheless, after Appellant was released from prison, it was not long before he was arrested again for felon in possession of a firearm. Appellant then moved to Texas, where he continued his criminal activity. The evidence showed that

Appellant was selling drugs and trying to get a business started as a pimp at the time that he agreed to commit the instant capital murder. This evidence showed that Appellant had not learned from his mistakes, and despite the support and encouragement from his family, he demonstrated an escalating pattern of disrespect for the law. *See Trevino*, 991 S.W.2d at 854 (holding that an escalating pattern of disrespect for the law can support a jury's finding of future dangerousness).

In support of his claim that the evidence is insufficient, Appellant argues that he had no prior violent offense convictions. Contrary to Appellant's claim, aggravated assault and aggravated robbery are violent offenses for which Appellant was previously convicted. Regardless, this Court has not required that the record contain evidence of prior violent offense convictions to support a jury's finding of future dangerousness. *See, e.g., Howard v. State*, 153 S.W.3d 382, 384 (Tex. Crim. App. 2004) (finding the evidence was sufficient to support the jury's answer to the future-dangerousness special issue despite the defendant's lack of prior convictions for criminal violence). Appellant also points out that he displayed good behavior while incarcerated in the Dallas County Jail. While good behavior in prison or jail is a factor to consider, it does not preclude a finding of future dangerousness. *Devoe v. State*, 354 S.W.3d 457, 468 (Tex. Crim. App. 2011).

Viewing the evidence in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that there was a probability that

Appellant would commit criminal acts of violence constituting a continuing threat to society. *See Dewberry*, 4 S.W.3d at 743 (finding the evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that the defendant posed a future danger to society where the defendant planned the capital murder, carried it out methodically and brutally, exhibited a callous disregard for human life, and showed no remorse or contrition for his actions). Thus, the evidence was legally sufficient to support the jury's answer to the future-dangerousness special issue. Issue 34 should be overruled.

RESPONSE TO ISSUE 35

This Court does not apply a factual-sufficiency review to the jury's finding of future dangerousness.

In Issue 35, Appellant argues that there is factually insufficient evidence of future dangerousness to support the jury's affirmative answer to the second special issue. (Appellant's Br. at 146). However, this Court does not apply a factual-sufficiency review to the jury's answer to the future-dangerousness special issue. *See Williams v. State*, 270 S.W.3d 112, 138 (Tex. Crim. App. 2008); *McGinn v. State*, 961 S.W.2d 161, 169 (Tex. Crim. App. 1998). Accordingly, Issue 35 should be overruled.

RESPONSE TO ISSUE 36

Because Appellant's challenge to the punishment charge is multifarious and inadequately briefed, it presents nothing for review and should be overruled.

In Issue 36, Appellant contends that the trial court erred by overruling his objections and denying his requested punishment-phase jury instructions. In 33 sub-points, Appellant outlines his complaints about various aspects of the trial court's punishment charge. Appellant concedes that this Court has previously addressed and rejected the issues he raises in these sub-points, but states that he is raising them here in order to preserve the issues for federal review. He also "moves this Court to reconsider prior rulings on each requested jury charge instruction [or] objection as it applies to the case at bar." (Appellant's Br. at 147-51).

Appellant does not provide any citations to the punishment charge in the trial record. He does not identify which portions of the charge he objected to or where in the charge his requested instructions should have been included. His brief contains no argument or citation to any legal authority in support of each objection or requested instruction. And despite his motion for this Court to reconsider its prior rulings regarding all of the matters he raises, he does not explain why this Court should do so.

This point of error is multifarious because it is based on more than one legal theory and raises more than one specific complaint. *See Davis*, 329 S.W.3d at 820 (holding that because appellant based a single point of error on more than one legal

theory, the entire point of error was multifarious); *Stults*, 23 S.W.3d at 205 (holding that a multifarious issue is one that embraces more than one specific ground or that attacks several distinct and separate rulings of the court). Standing alone, this is a sufficient basis for rejecting this point of error. *See Mays*, 318 S.W.3d at 385 (noting that a multifarious issue "risks rejection on that basis alone").

In addition, this point of error is inadequately briefed. The Rules of Appellate Procedure provide that an appellate brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(i). An appellate court has no obligation to construct and compose issues, facts, and arguments for an appellant. *Busby v. State*, 253 S.W.3d 661, 673 (Tex. Crim. App. 2008). A brief that fails to comply with Rule 38.1 is inadequately briefed and presents nothing for review. *See, e.g., Lucio v. State*, 351 S.W.3d 878, 898 (Tex. Crim. App. 2011) (holding that because appellant's brief contained no argument or citation to any authority, his point of error was inadequately briefed and presented nothing for review); *Cardenas v. State*, 30 S.W.3d 384, 393–94 (Tex. Crim. App. 2000) (deciding in a capital case that, by neglecting to present argument and authorities as required by Rule 38.1, the defendant's points were inadequately briefed); *see also Ladd v. State*, 3 S.W.3d 547, 575 (Tex. Crim. App. 1999) (holding that requiring capital appellants to abide by the briefing rules does not offend due process).

Because Issue 36 is multifarious and inadequately briefed, it presents nothing for review and should be overruled. *See* Tex. R. App. P. 38.1; *Davis*, 329 S.W.3d at 803; *Busby*, 253 S.W.3d at 673.

RESPONSE TO ISSUES 37-46

Appellant's federal constitutional challenges to the Texas death penalty statute are admittedly meritless and should be overruled.

In Issues 37 through 46, Appellant challenges the constitutionality of the Texas death penalty statute. He acknowledges that these issues have been previously overruled and are asserted mainly to preserve each issue for further review in the federal courts. (Appellant's Br. at 151).

In Issues 37 and 38, Appellant contends that Texas's statutory capital sentencing scheme is unconstitutional under the Eighth and Fourteenth Amendments because it does not permit meaningful appellate review.

In Issue 39, Appellant contends that the trial court erred in not concluding the punishment hearing and imposing a life sentence after being made aware of the issues supporting the reversal of the recent death penalty case of *Smith v. State*, 543 U.S. 37 (2004).

In Issue 40, Appellant contends that the Texas death penalty scheme violated his rights against cruel and unusual punishment and to due process of law under the Eighth and Fourteenth Amendments to the United States Constitution by requiring at

least ten "no" votes for the jury to return a negative answer to the punishment special issues.

In Issue 41, Appellant contends that the statute under which he was sentenced to death is unconstitutional in violation of the cruel and unusual punishment prohibition of the Eighth Amendment because it allows the jury too much discretion to determine who should live and who should die and because it lacks the minimal standards and guidance necessary for the jury to avoid the arbitrary and capricious imposition of the death penalty.

In Issue 42, Appellant contends that the trial court erred in denying his motion to hold article 37.071, sections 2(e) and (f) concerning the burden of proof unconstitutional as a violation of Article I, sections 10 and 13 of the Texas Constitution.

In Issue 43, Appellant contends that the trial court erred in denying his motion to preclude the death penalty as a sentencing option because article 37.071 fails to provide a method by which the State determines the death worthiness of the defendant, which is a violation of his right to equal protection and due process under the Fifth and Fourteenth Amendments to the United States Constitution, Article I, sections 13 and 19 of the Texas Constitution, and article 1.04 of the Code of Criminal Procedure.

In Issue 44, Appellant contends that the Texas death penalty scheme violated his rights against cruel and unusual punishment, to an impartial jury, and to due process of law under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because of vague, undefined terms in the jury instructions at the punishment phase of the trial that effectively determine the difference between a life sentence and the imposition of the death penalty.

In Issue 45, Appellant contends that the Texas death penalty scheme violates due process protections of the United States Constitution because the punishment special issue related to mitigation fails to require the State to prove the absence of sufficient mitigating circumstances beyond a reasonable doubt, contrary to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny.

In Issue 46, Appellant claims that the statutory special issue scheme in article 37.071 is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution because it permits the very type of open-ended discretion condemned by the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972), by allowing juries to decide future dangerousness based solely on the facts of the case.

Appellant invites the Court to revisit its stand on these issues, which he concedes have all been previously overruled. (Appellant's Br. at 151); *see also Saldano*, 232 S.W.3d at 107-09 (overruling multiple challenges to death penalty statute);

Escamilla v. State, 143 S.W.3d 814, 828-29 (Tex. Crim. App. 2004) (same). Appellant presents no new arguments for the State to address. This Court should decline Appellant's invitation to revisit these legal claims and overrule Issues 37 through 46.

PRAYER

The State prays that this Honorable Court will affirm the trial court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that there are 45,833 words in this document excluding the caption, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, signature, certificate of service, and certificate of compliance. This number exceeds the maximum allowable number of words provided in the Texas Rules of Appellate Procedure. *See* Tex. R. App. P. 9.4(i)(2)(A). The State is filing a Motion to Exceed the Word Count contemporaneously with this brief.

/s/ Jaclyn O'Connor Lambert

JACLYN O'CONNOR LAMBERT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was electronically filed and served on Appellant's attorney, John Tatum, Walnut Glen Tower, 8144 Walnut Hill Lane, Ste 1190, Dallas, Texas 75231, jtatumlaw@gmail.com, on March 30, 2020.

/s/ Jaclyn O'Connor Lambert

JACLYN O'CONNOR LAMBERT

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